91-255

No. _____

In The

Supreme Court of the United States

October Term, 1991

JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON,

Petitioners,

vs.

HOLIDAY INNS OF AMERICA, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Constitution of the United States, Missouri cannot deny citizens of other states the same right to seek redress for torts committed in Missouri by prosecuting separate actions against joint and several tortfeasors as that right is afforded to citizens of Missouri. This case presents a question of Missouri's de facto denial, by court decisions, of equal access to Missouri courts for citizens of Illinois:

> Where two unrelated torts were committed in Missouri by joint and several tortfeasors in which a citizen of Missouri was damaged by one tort and two citizens of Illinois were damaged by the other can Missouri, by court decisions written by the same judge within one calendar year, deny to the Illinois citizens the right to seek further relief in Missouri courts against a remaining joint and several tortfeasor after they settled with another of the tortfeasors while holding to the contrary in granting the identical right to a Missouri citizen to continue seeking further relief in Missouri courts against remaining joint and several tortfeasors after he, too, settled his separate action against another of the tortfeasors?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John Bourguignon and Cynthia Bourguignon respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit which, by memorandum dated March 19, 1991 affirmed the judgment of the United States District Court for the Western District of Missouri dated June 8, 1990 which had sustained a motion to dismiss and had dismissed the Complaint without a hearing on the merits.

Petitioners' petition for rehearing was denied by the United States Court of Appeals for the Eighth Circuit on May 14, 1991.

OPINIONS BELOW

The opinion of the District Court filed on June 8, 1990, and the per curiam memorandum opinion of the Court of Appeals filed on March 19, 1991 are not reported either officially or unofficially and are appended to this Petition as Appendices I and II.

A copy of the order denying rehearing is appended as Appendix III.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was filed March 19, 1991.

The Petition for Rehearing was denied May 14, 1991.

Jurisdiction of this Court is invoked under Article III, section 2 of the United States Constitution and the United States Code, Title 28, Section 1254(1).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Article III, Section 2:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Constitution of the United States, Amendment Fourteen, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article IV, Section 2:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."

Constitution of the United States, Article VI, clause 2:

> "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be

made under the authority of the United States, shall be the supreme law of the land; . . . . "

STATEMENT OF THE CASE

In parallel but unrelated tort cases, decided on appeal by opinions written by the same Missouri Court of Appeals judge within one year's time, the State of Missouri gave access to Missouri trial courts to a citizen of Missouri, Dr. Victor Arana, but denied equal access to Missouri trial courts under identical conditions to petitioner citizens of Illinois, John and Cynthia Bourguignon.

This petition is for certiorari to the United States Court of Appeals for the Eighth Circuit for review of its judgment which erroneously gave full faith and credit to the state court judgment which denied to the Illinois citizens equal access to Missouri courts.

1. Tort Damage to Illinois Citizens

Holiday Inns, Inc., acting as contracted swimming pool builder in Missouri, constructed a swimming pool at a motel in Warrensburg, Missouri for its owner, Thirteen-Fifty Investment Co.

The pool was too shallow for safe diving but was equipped with a diving board, false depth markers and was licensed for diving by the State of Missouri as a result of fraudulent plans and depth representations made by pool builder Holiday Inns to the State of Missouri, misrepresentations made unbeknownst to the motel owner.

Illinois citizen Sergeant John Bourguignon, a support member of the United States Air Force Thunderbirds, an internationally known precision flying demonstration team, was ordered into the State of Missouri for an air show demonstration scheduled for Whiteman Air Force Base at Knobknoster, Missouri, and was quartered in Thirteen-Fifty's motel at nearby Warrensburg.

Sergeant Bourguignon, standing next to the swimming pool's diving board, dove into the too-shallow pool, struck his head on the bottom and was rendered instantly a permanent quadriplegic, totally disabled for life.

2. Tort Damage to Missouri Citizen

Victor Arana, M.D., a licensed Missouri surgeon and a citizen of Missouri was sued by his patient, Mary Elam, for alleged medical malpractice. Dr. Arana was insured against public liability by Medical Protective Company of Fort Wayne, Indiana, whose policy afforded Dr. Arana veto power over settlements. Medical Protective and its attorneys settled the Elam claim without Dr. Arana's knowledge or consent.

3. Parallel Litigations

The long settled law of Missouri is declared in *Arana v. Koerner*, 735 S.W.2d 729, 734 (Mo. App. 1987):

> "A plaintiff suffering an injury by joint tortfeasors may sue each tortfeasor individually or may sue all tortfeasors in one action."

Dr. Arana sued his joint tortfeasors in two venues, declaring on the same transaction in each.

He sued his insurance company in the United States District Court for the Western District of Missouri (Appendix V) and sued the insurance company's lawyers in state court, the Circuit Court of Buchanan County. *Arana v. Koerner,* supra. During pendency of both actions he settled the federal court action, whereupon, the state court entered involuntary dismissal of the state court action against the lawyers. On appeal, the Missouri Court of Appeals, speaking through Gaitan, Presiding Judge, reversed the dismissal and ordered the separate case against the lawyers reinstated. *Arana v. Koerner,* supra.

The law of Missouri gave Mrs. Bourguignon a claim for loss of the consortium of her injured husband. Bourguignons declaring on the same transaction, just as *Arana* did, likewise sued their joint tortfeasors in two venues. Their separate damage action against the motel owner, only, although filed in the state Circuit Court of Johnson County, at Warrensburg, was transferred to the Circuit Court of Lafayette County where the pleadings were perfected for trial.

In Lafayette County, Bourguignons made a settlement with the motel owner which limited Bourguignons' right to execute on any judgment obtained against the motel owner. In that Lafayette County action, by third party petition, the motel owner sued the builder, Holiday Inns, Inc. for indemnity but Bourguignons never adopted Holiday Inns as a defendant and never stated a claim against Holiday Inns in that action. They were not required to do so under state law. *State ex rel. McClure v. Dinwiddie,* 213 S.W.2d 127 (Mo. banc 1948).

After obtaining judgment against the owner but before it was final, Bourguignons by separate action sued

the pool builder in the state Circuit Court of Johnson County, Missouri. They, too, suffered involuntary dismissal of their separate action against joint tortfeasor, Holiday Inns, Inc. On appeal, the same Missouri Court of Appeals speaking through the same Gaitan, Judge, affirmed the dismissal, denying the Illinois citizens access to Missouri courts to prosecute their separate action against the second joint tortfeasor. *John Bourguignon and Cynthia Bourguignon v. Thirteen-Fifty Investment Co. and Holiday Inns*, 759 S.W.2d 300 (Mo. App. 1988).

Application for transfer to the Supreme Court of Missouri was denied as a discretionary ruling of the Supreme Court. Under Missouri law it does not constitute a decision on the merits.

Bourguignons filed their tort action against Holiday Inns, Inc., in the United States District Court for the Western District of Missouri alleging diversity of citizenship and an amount in controversy exceeding $50,000 pursuant to United States Code, Title 28, Section 1332. A copy of the Complaint is appended as Appendix IV.

The federal district court, erroneously believing itself bound to the state court judgment of dismissal by full faith and credit requirements, dismissed the Complaint.

On appeal to the United States Court of Appeals for the Eighth Circuit, that court by memorandum opinion affirmed the district court's judgment of dismissal and a motion for rehearing was denied.

REASON FOR GRANTING THE WRIT

By its memorandum denial of appellate relief from the dismissal of the Complaint by the United States District Court for the Western District of Missouri, the United States Court of Appeals for the Eighth Circuit has decided an important question of federal law in a way that conflicts with *Truax v. Corrigan*, 257 U.S. 312, 314, 42 S.Ct. 124, 126-127, 66 L.Ed. 254, 259 (1921), wherein it is held that a state court's denial of a federal right by a judicial decision is not shielded from federal court review by the state court's mere disregard or denial of the existence or relevance of a federal question and conflicts with *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, 1898, 72 L.Ed.2d 262, 281 (1982), where in denial of an all preclusive construction of the full faith and credit statute, 28 U.S.C. § 1738, it is written that a state, before its judgment qualifies for full faith and credit under § 1738, must satisfy the requirements of the Due Process Clause and that federal courts are not required to grant full faith and credit to state court judgments which do not do so. The dismissal by Missouri did not do so.

The State of Missouri should not be permitted to do by its judicial branch that which it cannot do by legislation, denying to Illinois citizens their constitutional right of equal access to Missouri courts for redress of wrongs suffered in Missouri as such access is afforded to Missouri citizens.

Adhering to the majority rule in the United States, Missouri has a long established and maintained common law procedure of permitting victims of torts committed in Missouri to sue joint and several tortfeasors in separate

actions. By its established practice, Missouri does not require joinder of a victim's several tort claims against joint and several tortfeasors into one action. *Arana v. Koerner,* 735 S.W.2d 729, 734 (Mo.App. 1987):

> "A plaintiff suffering an injury caused by joint tortfeasors may sue each tortfeasor individually or may sue all the tortfeasors in one action."

By judicial decision, Missouri unconstitutionally denied to your petitioner citizens of Illinois that right to sue joint and several tortfeasors in separate actions in Missouri courts.

Petitioners Bourguignon are husband and wife citizens of Illinois who were damaged by husband's injury caused by joint and several tortfeasors in Missouri. Their tort claims against one of the tortfeasors filed in a Missouri trial court were dismissed involuntarily after they settled their claims against another of the tortfeasors with the dismissal being affirmed on appeal to Missouri's intermediate court, the Missouri Court of Appeals. By its affirming opinion, reported as *Bourguignon v. Thirteen-Fifty Investment Co.,* 759 S.W.2d 300 (Mo.App. 1988), it denied to your petitioners the identical access to Missouri courts to sue joint and several tortfeasors in separate actions which is given to citizens of Missouri. *Arana v. Koerner,* supra. After the Supreme Court of Missouri exercised its jurisdictional discretion to deny transfer, Bourguignons filed their Complaint in the United States District Court for the Western District of Missouri (Appendix IV)

The federal district court did not look behind the state court's dismissal to perceive the state's denial of

federal due process and equal protections of law as is shown by the disparate results between the *Arana* case, supra, and the *Bourguignon* case, supra, and simply holding that it was bound to give full faith and credit to the state court's decision of dismissal, dismissed the Complaint.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment of dismissal without opinion.

Thus, the United States Court of Appeals for the Eighth Circuit erroneously abrogated its duty to correct Missouri's denial of federal due process and equal protections of law as it has clear jurisdiction and a right to do under *Truax v. Corrigan*, supra, and under *Kremer v. Chemical Construction Corp.*, supra.

In *Truax* it is held, 257 U.S. 324, 42 S.Ct. 126-127, 66 L.Ed. 259, in denying blind application of full faith and credit to a state court decision on federal law:

> " . . . this court, as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

The same Missouri judge speaking for the same Missouri appeals court within one year's time permitted access to the Missouri trial courts for a citizen of Missouri and denied the same access to these citizens of Illinois in identical circumstances.

Missouri's law permitting tort victims to sue joint and several tortfeasors by separate actions is approved by decisions of Missouri's highest court, its supreme court. Decisions of Missouri's court of appeals cannot overrule nor change the law declared in decisions of Missouri's supreme court. Thus, the state court of appeals opinion cannot and did not change Missouri's law of providing redress against joint and several tortfeasors by separate actions.

It only denied that right to Illinois citizens.

The Missouri Court of Appeals affirmance of the Bourguignon dismissal ostensibly was based on Bourguignons' knowledge of the facts supporting their dismissed claims at the time they settled with the other tortfeasor, *id*, 759 S.W.2d 303:

> "Both actions by the Bourguignons involve the accident of John Bourguignon in the swimming pool in Warrensburg on June 27, 1977, and the potential responsibility of John Bourguignon, Thirteen-Fifty and Holiday Inns for his injury and his wife's derivative claims. The Bourguignons and the Thirteen-Fifty have merely framed their pleadings in this second action around legal theories which were available to them at the time of the first action. . . . All of the facts relied upon by the Bourguignons and Thirteen-Fifty in support of their present tort, fraud and contractual indemnity claims were known during discovery and before the trial of the first action."

Knowledge of the facts of a tort is no reason for denying access to Missouri courts for redress. Missouri citizen Arana also knew, as a matter of law, all of the facts upon which his dual pending actions were based at the

time he settled his federal court action. His knowledge did not bar his state court action as Missouri conversely held that the knowledge of these Illinois citizens barred their action.

Regarding the fundamental importance of the constitutional right of equal access to the courts, in a constitutional discourse preliminary to the examination of an Ohio statute related to access to Ohio's courts, it is written in *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143, 146:

> "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution."

In *American Federation of Labor v. Swing*, 312 U.S. 321, 326-327, 61 S.Ct. 568, 570, 85 L.Ed. 855, 857 (1941), in discussion of the constitutional guaranty of free speech in a labor right-to-picket case, it is indicated that a state may not deny a constitutionally guaranteed right by judicial decision if it cannot deny that identical constitutional right by legislative enactment:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an

> industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."

On the face of the two relevant Missouri Court of Appeals opinions, *Arana v. Koerner*, supra, and *Bourguignon v. Thirteen-Fifty Investment Co.*, supra, citizenship is not mentioned, the fact of a classification based on citizenship is not patent and, accordingly, the opinions deceptively would indicate only that an error of state law has occurred in the dismissal of the action of the Illinois citizens.

But, as is suggested in *Truax v. Corrigan*, supra, the constitutionally proscribed discrimination based on citizenship is readily identified and made salient by looking behind the decision to the undisputed facts of citizenship which were lodged before the Missouri Court of Appeals. The facts demonstrate that the only distinction between the cases, one dismissed, the other reinstated, is the citizenship of the claimants. Judicial silence concerning citizenships of the claimants cannot serve constitutionally to legitimize denial of equal access to Missouri courts by the citizens of Illinois. There is no legitimate state purpose served by permitting Missouri citizen Arana to sue in state court and barring Illinois citizens Bourguignons in their identical circumstances.

Unconstitutional discrimination is wherever it is found, not merely where it is admitted.

On the rationale of *Truax v. Corrigan*, supra, the unconstitutional de facto discrimination made against these Illinois citizens by Missouri's state court affirmance

of the dismissal of their action is not shielded from federal court review by the state court's silence on the fact of their foreign citizenship which carries with it the federal right of equal access to Missouri's courts. Paraphrasing, if the rule were otherwise, it almost always would be within the power of a state court to deny to citizens of other states the equal access to the state's courts which is guaranteed by the federal constitution.

This petition for certiorari presents a constitutional question of national importance. If the State of Missouri by judicial fiat which merely fails to mention citizenship can deny to citizens of other states equal access to Missouri courts, then every other state may do the same, in circumvention of Article IV, Section 2 of the Constitution of the United States.

Petitioners respectfully suggest that the Petition for Writ of Certiorari should be granted to review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2147

John Bourguignon and Cynthia Bourguignon,	*	
Appellants,	*	Appeal from the United States District Court for the Western District of Missouri.
vs.	*	
Holiday Inns of America, Inc.,	*	
Appellee.	*	[UNPUBLISHED]
	*	

Submitted: March 13, 1991
Filed: March 19, 1991

Before FAGG, Circuit Judge, SNEED,* Senior Circuit Judge, and LOKEN, Circuit Judge.

PER CURIAM.

John and Cynthia Bourguignon appeal from the district court's dismissal[1] of their lawsuit against Holiday Inns of American for intentional and fraudulent concealment of the defective construction of a swimming pool.

---

*The HONORABLE JOSEPH T. SNEED, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

The district court determined that the Bourguignon's claims were previously decided by the Missouri Court of Appeals in *Holiday Inns v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo. App. 1986) and *Bourguignon v. Thirteen-Fifty Investment Co.*, 759 S.W.2d 300 (Mo. App. 1988), and thus were barred from reconsideration in federal court by collateral estoppal [sic] and res judicata. Having thoroughly reviewed the record, we agree with the district court's careful analysis and accordingly affirm its decision. *See* 8th Cir. R. 47B.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

JOHN BOURGUIGNON and CYNTHIA BOURGUIGNON,	)	
Plaintiffs,	)	No. 89-4126-CV-C-9
v.	)	FILED JUN 08 1990
HOLIDAY INNS OF AMERICA, INC.,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING DEFENDANT'S MOTION FOR SANCTIONS

This case arises out of an accident that occurred at the Holiday Inn at Warrensburg, Missouri, on June 27, 1977. Plaintiff John Bourguignon dove into the swimming pool at the Holiday Inn and struck his head on the bottom of the pool. Since the accident, John Bourguignon has been a quadriplegic, paralyzed from the neck down.

Defendant argues that this case should be dismissed because it has twice been considered and ruled on in *Holiday Inns. Inc. v. Thirteen-Fifty Investment Co. and John Bourguignon and Cynthia Bourguignon,* 714 S.W.2d 597, (Mo. App. 1986) (*Bourguignon I*) and in *John Burguignon [sic] and Cynthia Bourguignon v. Thirteen-Fifty Investment Co. and Holiday Inns, Inc.,* 759 S.W.2d 300 (Mo. App. 1988) (*Bourguignon II*). Therefore, defendant argues that plaintiffs' claim is barred by res judicata and that plaintiffs are collaterally estopped from raising in this case issues that have previously been decided. Plaintiffs argue that the doctrines of res judicata and collateral estoppel do not

apply because the claim and issues that they raise in this lawsuit have never been litigated.

I. Litigation History

A. Bourguignon I

John Bourguignon and his wife, Cynthia, filed suit in Lafayette County Circuit Court against Holiday Inns' franchisee, Thirteen-Fifty Investment Company (Thirteen-Fifty), the motel operator, alleging negligent maintenance of the swimming pool. Specifically, the Bourguignons alleged that Thirteen-Fifty failed to maintain the pool in a safe condition, that the water in the pool was unreasonably dirty and murky, that the pool area and specifically the water in the pool was poorly lighted and the pool area was not marked with warnings of the dangerous conditions present.

On July 12, 1983, Thirteen-Fifty filed a third-party petition against Holiday Inns for contribution or indemnification in the event the Bourguignons obtained a judgment against Thirteen-Fifty. In the third-party petition, Thirteen-Fifty alleged that Holiday Inns was negligent in designating the architect, approving the architect's plans and constructing and inspecting the swimming pool. Additionally, Thirteen-Fifty alleged that Holiday Inns breached its contract for constructing the swimming pool by failing to comply with the architect's plans and specifications.

On July 31, 1984, the Bourguignons amended their petition alleging negligence against Thirteen-Fifty for the construction activities of Holiday Inns. Specifically, the

Bourguignons alleged that the swimming pool, constructed by Holiday Inns, was deceptively shallow, of insufficient depth for diving and that the tile markings did not warn of the correct depth.

On August 10, 1984, ten days after plaintiffs filed their First Amended Petition, plaintiffs, Thirteen-Fifty and Thirteen-Fifty's insurer, Employer's Mutual Casualty Company, entered into a settlement agreement. The agreement, allegedly made pursuant to § 537.065 R.S.Mo., limited the Bourguignons' recovery against Thirteen-Fifty to one million dollars plus any amount Thirteen-Fifty could collect on its contractual indemnity claim.

Holiday Inns filed a motion for a separate trial. The motion was denied and the Bourguignons' suit against Thirteen-Fifty was tried together with Thirteen-Fifty's third party claim against Holiday Inns. Thirteen-Fifty submitted only the contractual indemnity claim against Holiday Inns to the jury.

The jury returned a verdict against Thirteen-Fifty in favor of John Bourguignon for $12,500,000 and Cynthia Bourguignon for $2,000,000. Both verdicts were reduced by ten percent for John Burguignon's [sic] comparative fault. The jury also returned a verdict in favor of Thirteen-Fifty on its contractual indemnification claim against Holiday Inns in the amount of $13,050,000.

Holiday Inns appealed the judgment entered against it on Thirteen-Fifty's third party claim and the Missouri Court of Appeals reversed. *Bourguignon I*, 714 S.W.2d 597. The holding in *Bourguignon I* was summarized in *Bourguignon II* as follows:

> This court held that Thirteen-Fifty breached its duties to its indemnitor, Holiday Inns, by actively helping the Bourguignons prove liability against Holiday Inns while Thirteen-Fifty represented to the jury that it was contesting the case. Further, at the trial of the first action, Thirteen-Fifty's counsel made no attempt to cross-examine plaintiffs' expert economist, and in the closing argument, Thirteen-Fifty's counsel admitted liability for having a dangerous swimming pool on its premises and argued against John Bourguignon's contributory negligence. Other examples of the combined efforts of the Bourguignons and Thirteen-Fifty at the trial of the first action against Holiday Inns were cited by this Court. These efforts resulted in an adverse ruling on Thirteen-Fifty's third party action.
>
> This Court held that due to the prejudicial conduct of Thirteen-Fifty, combined with the Bourguignons, Holiday Inns would be discharged from and obligations in indemnity. As a consequence, we reversed the jury verdict against Holiday Inns without remanding for trial. The Supreme Court denied the Bourguignons' Petition for a Writ of Prohibition and also denied the applications for transfer filed by the Bourguignons and Thirteen-Fifty. That judgment thereafter became final.

Bourguignon II, 759 S.W.2d at 301.

The court in *Bourguignon I* concluded that the purpose behind the settlement agreement between the Bourguignons and Thirteen-Fifty and its insurer was "to rectify plaintiff's failure to file suit against Holiday Inns before the running of the statute of limitations. It attempts to force Holiday Inns Inc. to make a status

change from third-party defendant into 'defendant.' " *Bourguignon I*, 714 S.W.2d at 603, n.3.

B. Bourguignon II

While *Bourguignon I* was on appeal, the Bourguignons filed a new case against Thirteen-Fifty and Holiday Inns. In their Second Amended Petition plaintiffs sought to enforce an equitable creditor's bill granting the Bourguignons an interest in Thirteen-Fifty's non-contractual indemnity claim against Holiday Inns to satisfy the unpaid balance of the Bourguignons judgment against Thirteen-Fifty. Also, plaintiffs alleged that Holiday Inns had intentionally and fraudulently concealed the defective construction of the swimming pool. (These allegations of fraud against Holiday Inns are identical to the allegations of fraud in the present action.) In *Bourguignon II*, Thirteen-Fifty filed a Cross-Claim and a First Amended Cross-Claim against Holiday Inns for non-contractual indemnification.

The circuit court granted Holiday Inns' Motion to Dismiss Plaintiffs' Second Amended Petition and Thirteen-Fifty's First Amended Cross-Claim:

> In this action, plaintiffs contend [1] defendant Thirteen-Fifty still retains a cause of action against Holiday Inns on a tort theory, or non-contractual indemnification, and that the Western District's judgment reversal should be construed strictly to apply only to the contractual indemnification claim, and that both liability and the amount of damages, including the apportionment, was determined in plaintiffs' first suit, and these issues are res judicata and binding on all parties, and [2] plaintiffs now

have a right to collect the total amount of their judgment against Thirteen-Fifty on a "creditor's bill" theory against judgment debtor Thirteen-Fifty's chose against Holiday Inns pleaded in Thirteen-Fifty's cross-claim herein against Holiday Inns.

It is plaintiffs' position Thirteen-Fifty's right to tort recovery in non-contractual indemnity is not before the court in *Holiday Inns v. Thirteen-Fifty*, supra and that the decision therein does not bar plaintiffs' action and the cross-claim here. This position is bottomed on the theory that Thirteen-Fifty did not, in fact, have a cause of action against Holiday Inns in the first case on a contractual indemnity theory, submitted its claim on a misconceived availability of a remedy, and pursued an imaginary or mistaken remedy which, under *Pemberton v. Ladue Realty Company*, 224 S.W.2d 383 (Mo. 1949) and *Hollipeter v. Stuyvesant Ins. Co.*, 523 S.W.2d 595 (K.C. 1975), does not now bar recovery under a non-contractual indemnity theory.

. . .

This court feels a strong and compelling sympathy with the plaintiffs in their tragic and horrendous loss. The urge to adopt the position taken by plaintiffs and defendant Thirteen-Fifty in this matter is overwhelming. But it troubles the court to accept the position of plaintiffs and Thirteen-Fifty which would seem to encourage others in like situations to combine to their advantage impermissibly to prejudice the rights of a contractual indemnitor and then, if caught up short, return to the starting line and jointly pursue, as here, the indemnitor again on another theory and contend all the while the amount of damages and determination of percentage of fault is res judicata and cannot be

> questioned by the indemnitor in the second action.
>
> The Court finds and holds that whether Holiday Inns' motions are characterized as motions to dismiss or, as plaintiffs urge, motions for summary judgment, plaintiffs' amended petition and Thirteen-Fifty's amended cross-claim are dismissed on the basis that by the ruling of the Missouri Court of Appeals in *Holiday Inns v. Thirteen-Fifty Investment Company and John Bourguignon and Cynthia Bourguignon*, 714 S.W.2d 597 (Mo. App. 1986), they are now estopped from asserting further right to collect plaintiffs' judgment against Holiday Inns and that there is no judgment upon which execution can issue in favor of plaintiffs against Holiday Inns.

In his opinion, the trial judge focused on plaintiffs' effort to stand in Thirteen-Fifty's shoes and assert Thirteen-Fifty's non-contractual indemnity claim against Holiday Inns. The fraud claims were not mentioned. However, the fraud claims, as well as the equitable garnishment claims, were dismissed.

The Bourguignons and Thirteen-Fifty appealed. The Court of Appeals affirmed the circuit court's order in *Bourguignon II*, 759 S.W.2d 300.

> Here, we find that because the claims of noncontractual indemnity and contractual indemnity were used as strategic devices by Thirteen-Fifty in the first action, Thirteen-Fifty's election of one remedy and abandonment of the other should be binding on Thirteen-Fifty. As Thirteen-Fifty has taken one remedy to judgment and lost, they should not be allowed to follow that action with an alternative theory of recovery. Once again, it should be stated that Thirteen-Fifty did have the remedy of contractual

> indemnity, but through its course of prejudicial conduct, it forfeited that remedy.

Id. at 304.

In their briefs on appeal, in addition to challenging the circuit court's dismissal of the equitable garnishment claim, the Bourguignons challenged the dismissal of their tort claims against Holiday Inns. The Bourguignons argued that "[t]he trial court erred in dismissing plaintiffs' entire petition on a finding that defendant Thirteen-Fifty's claim for indemnity against Holiday Inns is barred by estoppel because . . . the fact plaintiffs may be estopped from collecting damages from Holiday Inns by equitable garnishment of Thirteen-Fifty's claim for indemnity does not bar plaintiffs' second tort claim against Holiday Inns." Statement Brief and Argument of Appellants Bourguignon at 6.

Holiday Inns responded in Point Relied On II of its brief on appeal that the tort claims were properly dismissed because "the Bourguignons' tort claims are barred by the doctrines of res judicata and collateral estoppel as discussed in Point III of this brief." Point Relied On III reads as follows:

> THE CIRCUIT COURT PROPERLY DISMISSED THE BOURGUIGNONS' SECOND AMENDED PETITION AND THIRTEEN-FIFTY'S FIRST AMENDED CROSSCLAIM IN THE SECOND ACTION AS THESE PLEADINGS ARE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL, AS ALL OF THE ALLEGATIONS OF THESE PLEADINGS WERE RAISED OR COULD HAVE BEEN RAISED BY THE BOURGUIGNONS AND THIRTEEN-FIFTY IN THE FIRST ACTION INVOLVING THE SAME PARTIES, EVENT AND ISSUES, WHICH WAS

DECIDED BY THIS COURT AND REPORTED AT 714 S.W.2d 597.

Two of the cases cited by Holiday Inns in support of this point were *Siesta Manor, Inc. v. Community Federal Savings & Loan Assn*, 716 S.W.2d 835 (Mo. App. 1986) and *Dreckshage v. Community Federal Savings & Loan Assn*, 641 S.W.2d 831 (Mo. App. 1982). In their Reply brief plaintiffs disputed the application of these cases.

The Missouri Court of Appeals responded to these arguments by making clear that its affirmance was not restricted to approving dismissal of the plaintiffs' attempt to equitably garnish Thirteen-Fifty's noncontractual indemnity claim. The court also approved dismissal of the plaintiffs' tort claims against Holiday Inns.

> The doctrines of res judicata and collateral estoppel require dismissal when a party tries to relitigate an action involving the same events, parties and issues as in a previously decided action. This is true notwithstanding the parties' attempt to pin a different label on its legal theories in the second lawsuit. *Siesta Manor, Inc. v. Community Federal Savings & Loan Ass'n.*, 716 S.W.2d 835 (Mo. App. 1986); *Dreckshage v. Community Federal Savings & Loan Ass'n.*, 641 S.W.2d 831 (Mo. App. 1982).
>
> Both actions by the Bourguignons involve the accident of John Bourguignon in the swimming pool in Warrensburg on June 27, 1977, and the potential responsibility of John Bourguignon, Thirteen-Fifty and Holiday Inns for his injuries and his wife's derivative claims. *The Bourguignons and Thirteen-Fifty have merely framed their pleadings in this second action around legal theories which were available to them at the time of the first action.* As a matter of fact, as previously stated, Thirteen-Fifty initially alleged non-contractual

> indemnity and tort claims against Holiday Inns in the first action, but they intentionally and strategically abandoned all claims except contractual indemnity in that first action. *All of the facts relied upon by the Bourguignons and Thirteen-Fifty in support of their present tort, fraud, and non-contractual indemnity claims were known during discovery and before the trial of the first action.*

Bourguignon II, 759 S.W.2d at 303 (emphasis added).

II. Discussion

A. Full Faith and Credit

Referring to 28 U.S.C. § 1738, the Supreme Court in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883 (1982), stated that: "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged."

> Where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimal procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. . . . As we recently noted in *Allen v. McCurry, supra*, 'though the federal courts may look to the common law or to the policy supporting res judicata and collateral estoppel

> in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the state from which the judgments emerged would do so. . . . '
>
> The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the 'same' preclusive effect as the courts of the State from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all.

Id. at 1897-98 (citations omitted).

Defendant argues this case should be dismissed because of the holding in *Bourguignon II*:

> The Missouri Court of Appeals decision in *Bourguignon II* operates as a binding decision for this court pursuant to *Gribben v. Lucky Star Ranch Corp.*, 623 F. Supp. 952 (W.D. Mo. 1985), in which this court held that when a prior judgment is rendered in a state court, a federal court is required to give the judgment the same preclusive effect as the judgment would have received in the state in which it is rendered.

Defendant's Suggestions in Support of Motion to Dismiss at 8.

Plaintiffs argue that the trial court and the appellate court in *Bourguignon II* did not consider or adjudicate the Bourguignons' fraud action against Holiday Inns. Plaintiffs' Response to defendant's Motion to Dismiss at 13.

"In *Bourguignon II* Judge Barnes of the Circuit Court of Johnson County, Missouri, decided only two issues; Thirteen-Fifty did not have a cause of action against Holiday Inns for noncontractual indemnification and the Bourguignons could not collect from Holiday Inns, on a creditor's bill the total amount of their judgment against Thirteen-Fifty." *Id.* at 13-14. Plaintiffs further argue that, "the entire and sole focus of the appellate court's opinion, as it pertained to the Bourguignons, was that there did not exist contractual or non-contractual indemnity running from Holiday Inns to Thirteen-Fifty for the amount of the Bourguignons' judgment against Thirteen-Fifty in *Bourguignon I*. The Court of Appeals decided nothing more or no less." *Id.* at 16. Plaintiffs conclude, therefore, that:

> The application of *Bourguignon I* as res judicata and collateral estoppel to the claims and issues which were before the appellate court in *Bourguignon II* underscores the fact that *Bourguignon II* concerned *indemnification only*. The Court of Appeals simply did not consider the Bourguignons' fraud action against Holiday Inns. The judgment of the trial court and affirmance by the Court of Appeals addressed the Bourguignons' action on a creditor's bill and left the fraud action unresolved.

Id.

The history of this case provides unusual guidance for my decision. Typically, when a federal court is asked to determine whether a state court judgment bars further litigation under the doctrines of res judicata and collateral estoppel, the federal court is obligated to predict how

the state from which the judgment was taken would apply those doctrines. In this case, however, the Missouri Court of Appeals in *Bourguignon II* has determined the preclusive effect of *Bourguignon I*.

As demonstrated by the previous discussion of *Bourguignon II*, the parties argued before the Court of Appeals the issue of whether the Bourguignons' fraud claims against Holiday Inns were barred. In response to these arguments, the Court of Appeals decided the entire Second Amended Petition, including the fraud claims, was properly dismissed. "The Bourguignons and Thirteen-Fifty have merely framed their pleadings in this second action around legal theories which were available to them at the time of the first action." 759 S.W.2d at 303.

Plaintiffs argue that the court's discussion of the doctrines of res judicata and collateral estoppel in *Bourguignon II* is merely *obiter dictum*. I disagree. The Missouri Court of Appeals discussion of the fraud claims and its conclusion that the fraud claims were barred was essential to its decision to affirm the dismissal of all claims asserted in plaintiffs' Second Amended Petition.

Accordingly, I will give *Bourguignon II* the same preclusive effect that I believe *Bourguignon II* would be given by Missouri courts. Had the plaintiffs brought their fraud claims in a Missouri court rather than here, a Missouri court would have dismissed them based on *Bourguignon II*. There would have been an "(a) identity of the thing sued for; (b) identity of the cause of action; (c) identity of the parties to the action; and (d) identity of the quality of the person for or against whom a claim is made." *See State ex rel. Agri-Trans Corp. v. Nolan*, 756 S.W.2d 203, 207

(Mo. App. 1988). The proceedings in *Bourguignon II* satisfy due process because plaintiffs had a full and fair opportunity to litigate the issue of whether their fraud claims were barred by res judicata and collateral estoppel.

Furthermore, I will accord *Bourguignon I* the same preclusive effect that *Bourguignon I* was given by the Missouri Court of Appeals in *Bourguignon II*. Again, no due process problems exist because plaintiffs were afforded a full and fair opportunity to litigate their fraud claims in *Bourguignon I* for the reasons stated in *Bourguignon II*.

Accordingly, granting *Bourguignon I* and *Bourguignon II* the same preclusive effect here as they would receive in Missouri state courts, defendant's Motion to Dismiss will be granted.

D. Sanctions

Rule 11 sanctions will not be imposed in this case. I believe that plaintiffs' counsel conducted a reasonable investigation into the facts and the law surrounding these issues. Careful research and a thorough presentation should not always lead to a conclusion that sanctions are inappropriate if the issues raised are frivolous. Here, however, the complexity of the facts and the somewhat obtuse state court decisions counsel against the imposition of sanctions.

IV. Conclusion

Accordingly, it is hereby ORDERED that:

1) defendant's Motion to Dismiss is granted; and

2) defendant's Motion for Sanctions is denied.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
June 8, 1990.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2147WM

John Bourguignon and Cynthia Bourguignon,	*	
Appellants,	*	Appeal from the United States District Court for the Western District of Missouri
vs.	*	
Holiday Inns of America, Inc.,	*	
Appellee.	*	

Appellants' petition for rehearing has been considered by the court and is denied.

May 14, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
MISSOURI, CENTRAL DIVISION

JOHN BOURGUIGNON and CYNTHIA BOURGUIGNON, Plaintiffs, vs. HOLIDAY INNS OF AMERICA, INC., Defendant.	)	No. 89 4126-CV-C-9 FILED MAR 29 1989

COMPLAINT

1. Plaintiffs are husband and wife, invoke diversity jurisdiction and for their personal injury tort claims which accrued in and under the laws of Missouri further allege and state.

Jurisdiction

2. Plaintiffs are citizens and residents of the State of Illinois. Defendant corporation is incorporated under the laws of Delaware, has its principal place of business in Memphis, Tennessee, and does business in the State of Missouri including business within the Central Division of the Western District of Missouri. The amount in controversy in each claim, exclusive of interest and costs, exceeds fifty thousand dollars.

Facts

3. In Warrensburg, Missouri, on June 27, 1977, plaintiff husband was a guest in a Holiday Inn motel which had been constructed by defendant for its franchisee operator, Thirteen-Fifty Investment Company. Then and there, during the hours of darkness, with defendant's fraudulent concealment of danger or its reckless disregard for the safety of plaintiff husband or by its negligence, defendant invited and induced plaintiff husband to dive into the motel swimming pool which was known to defendant to be too shallow for safe diving, and thus and thereby defendant caused or contributed to cause plaintiff husband to break his neck and become permanently quadriplegic and totally disabled and dependent for his daily survival on others, directly causing plaintiffs to sustain damage as hereafter set forth.

4. The State of Missouri regulates the safety of motels for guests as part of the state's annual licensing for operation and requires motel swimming pools furnished for guest diving to have a minimum of eight and a half feet of water in the diving area. Defendant knowingly, willfully and intentionally constructed the pool in violation of the state safety regulation with less than the required diving depth and turned it over to its franchisee to be furnished for guest diving.

5. By constructing the pool too shallow for safe diving and furnishing it to its franchisee for use of guests for diving, defendant showed complete indifference to and conscious disregard of the safety of motel guests, including plaintiff husband.

6. Defendant affirmatively misrepresented and falsely warranted that the pool was constructed in compliance with the state's diving safety requirements and, specifically, that it had eight and a half feet of water in its diving pool as was required before the state would license the motel for operation with the swimming pool furnished for guest diving, in the particulars that:

a. Defendant franchisor required franchisee innkeeper to pay an architect, who was a director of franchisor corporation defendant and who maintained his offices in defendant's headquarters building in Memphis, Tennessee, to design the motel to meet defendant franchisor's specifications.

b. That architect originally designed the motel's swimming pool to have nine feet of water in the diving pool and the city of Warrensburg, Missouri, issued its building permit accordingly.

c. That architect revised the nine feet deep plans to provide for only eight feet of water in the diving pool, furnished the eight feet deep plans to defendant's "construction division" and submitted the revised eight feet deep plans to the State of Missouri for approval.

d. On November 14, 1968, the state rejected the revised eight feet deep plans and advised the architect that, among other changes which were needed, eight and a half feet of water was the minimum depth of water which the state would approve.

e. In response to the state's November 14 letter of rejection, the plans were revised again and on November 20, 1968, the architect sent the further revised plans to the state and advised by

cover letter: "The pool depth has been increased to 8'-6" deep."

f. Based on that revision, the state approved the eight and a half feet deep plans by letter of November 27, 1968, to the motel manager with a copy to the architect.

g. Defendant, through its "construction division" willfully disregarded both the eight feet deep plans and the eight and a half feet deep plans in the particular of pool depth and constructed the pool to a maximum depth of seven feet six inches except for a small sump area at the main drain which was deepened to seven feet eight and a half inches. At no place did the pool reach a depth of even the state-rejected eight feet depth.

h. Defendant had no intention, ever, of obeying the state requirement for eight and a half feet of water. At the very time the eight and a half feet of water revised plan was before the state for approval and yet unapproved, the pool already had been constructed to the point that the bottom was poured and the false 8 feet tile markers were set in the sidewalls of the pool where the already established pool depth was only seven feet three inches.

7. Defendant installed a diving board and stand for use of motel guests and thus falsely represented and warranted to its franchisee operator and motel guests that the pool was deep enough for safe diving.

8. Defendant intended that its false representations and warranties, both direct and indirect, that the pool complied with state safety requirements and was safe for diving should be believed by the State of Missouri and acted on in approving the pool, should be believed by its franchisee and acted on in its commercial acceptance of

the pool as constructed and should be believed and acted on by motel guests, including guest plaintiff husband, as a representation of the safety of the pool for diving which was material to plaintiff husband's use of the pool for diving.

9. Plaintiff husband did not know the pool was too shallow for safe diving and, because of the superior knowledge of defendant, whose nationally recognized name was on the motel, had a right to rely on the false representations made to him, direct and indirect, by defendant that the pool was safe for diving.

10. Plaintiff husband did believe and rely on defendant's direct and indirect misrepresentations and false warranties of safety made to him and, in his belief and reliance, was fraudulently induced by defendant to dive into the unsafe pool to his directly resulting permanent injury and damage, as abovesaid.

11. Plaintiffs live in Illinois and did not have investigative access to the dangerous pool nor the records of defendant. After plaintiff husband's injury, the measured depth of the pool, the records of the false pool plans submitted for approval of the state compared to the state's safety standards were not reasonably available to plaintiffs. Defendant fraudulently concealed its culpability by intentionally breaching its duty to tell the motel operator that the pool did not meet state safety requirements, that the tile depth markers were false and that the diving board invitation to guests to dive should be removed. After defendant's duplicity in construction and licensing of the pool, in the opinion of the motel operator's hired swimming pool expert, was discovered

in June 1984, defendant continued to actively conceal its intentional breach of the safety standards and, thus, to conceal the existence of plaintiffs' claims against it, by hiring a safety engineer who falsely stated that the game of water polo requires diving, that the state approves a minimum of six feet of water for pools used for water polo and that, thus, the state safety standards require only six feet of water for diving and that the pool did in fact comply with the state safety standards.

Plaintiff Husband's Claim

12. All preceding allegations are incorporated in plaintiff John Bourguignon's claim against defendant for his personal injury and damage.

13. In prior state court litigation, plaintiffs sued the innkeeper and the innkeeper sued defendant for indemnity. In that action to which the parties here were litigants and privies, the issue of the damages which John Bourguignon sustained as a result of the dangerous pool and his dive into it have been liquidated and finally adjudicated to be twelve million, five hundred thousand dollars. The prior decision of the issues of cause and damage is res judicata and cannot be relitigated or contested here by either plaintiffs or defendant.

14. The facts that defendant built the pool to the depth it had when John Bourguinon [sic] was injured and the fact that defendant misrepresented and concealed its true depth was admitted in the prior litigation, is res judicata and cannot be relitigated or contested here by plaintiffs or defendant.

15. Because said injury and actual damage was sustained by John Bourguignon as a direct result of the fraud of defendant and from defendant's complete indifference to and conscious disregard of the safety of John Bourguignon, he is entitled to recover exemplary and punitive damages of and from defendant in the reasonable sum of ten million dollars.

WHEREFORE, plaintiff John Bourguignon prays judgment against defendant in the adjudicated and res judicata sum of twelve million, five hundred thousand dollars for and as actual, compensatory damages and in the sum of ten million dollars for and as punitive damages together with judgment for plaintiff's costs.

Plaintiff Wife's Claim

16. All preceding allegations are incorporated in plaintiff Cynthia Bourguignon's claim against defendant for loss of her husband's support, aid, services and consortium which plaintiff wife has sustained and will sustain in the future because of the permanent injury and paralysis of her husband, abovesaid.

17. In the mentioned prior litigation, the damages which plaintiff wife sustained as a result of the dangerous pool and her husband's dive into it have been liquidated and adjudicated to be two million dollars. That issue of cause and damage is res judicata and cannot be relitigated or contested here by either plaintiffs or defendant.

18. Because said injury to her husband and actual damage to plaintiff wife were sustained as a direct result of the fraud of defendant and from defendant's complete

indifference to and conscious disregard of the safety of John Bourguignon, she is entitled to recover exemplary and punitive damages of and from defendant in the reasonable sum of ten million dollars.

WHEREFORE, plaintiff Cynthia Bourguignon prays judgment against defendant in the adjudicated and res judicata sum of two million dollars for and as actual, compensatory damages and in the sum of ten million dollars for and as punitive damages and for judgment for plaintiff's costs.

POLSINELLI, WHITE, VARDEMAN & SHALTON

By _____
Paul E. Vardeman
Plaza Theatre Building
4705 Central
Kansas City, Missouri
64112
(816) 931-3353

and

ANDERSON & MILHOLLAND

By /s/ John C Milholland
John C. Milholland
101 East Wall –
P.O. Box A
Harrisonville,
Missouri 64701
(816) 884-3218 or
524-7424

ATTORNEYS FOR PLAINTIFFS

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury.

POLSINELLI, WHITE, VARDEMAN & SHALTON

By _____
Paul E. Vardeman
Plaza Theatre Building
4705 Central
Kansas City, Missouri
64112
(816) 931-3353

and

ANDERSON & MILHOLLAND

By /s/ John C Milholland
John C. Milholland
101 East Wall –
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Harrisonville,
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(816) 884-3218 or
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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

VICTOR A. ARANA, M.D. Plaintiff	)	Case No. 83-6144-CV-55-6
vs.	)	JURY TRIAL ON
THE MEDICAL PROTECTIVE COMPANY OF FORT WAYNE, INDIANA, a Corporation	)	ALL CLAIMS DEMANDED
Defendant	)	FILED NOV 15 1983

COMPLAINT

Comes now plaintiff, Victor A. Arana, M.D., and for his cause of action against defendant The Medical Protective Company of Fort Wayne, Indiana, states as follows:

JURISDICTION

1. Jurisdiction is based on 28 U.S.C. Section 1332 in that the parties are residents of different states and the amount in controversey [sic] exceeds $10,000 exclusive of interest and costs.

THE PARTIES

2. Plaintiff is a resident of the State of Missouri, residing at 2015 North 36th Street, St. Joseph, Missouri. Plaintiff is, and at all times relevant to this action, was a physician and surgeon licensed to practice medicine in the State of Missouri.

3. Defendant The Medical Protective Company of Fort Wayne, Indiana is a corporation organized and existing under the laws of the State of Indiana with its principal place of business in Fort Wayne, Indiana. Defendant is engaged in the business of medical malpractice insurance and has routinely done business within the Western District of Missouri.

COUNT I

BREACH OF CONTRACT

4. Plaintiff realleges and incorporates herein by reference paragraphs 1-3, *supra*.

5. On or about June 1, 1980, defendant issued and delivered to plaintiff a policy of medical malpractice issuance, policy number 518270 ("policy"), for which plaintiff paid a premium of about $3,552.00. A copy of the policy is attached hereto as "Exhibit 1" and incorporated by reference as if fully set out herein.

6. Under the policy, defendant was obligated to defend plaintiff against and pay damages on behalf of plaintiff *inter alia* for acts and omissions occurring between June 1, 1980 and June 1, 1981 with respect to which plaintiff was alleged or found to be legally responsible in the practice of his profession. In particular, the policy provided:

> "B. Upon receipt of notice, the Company shall immediately assume its responsibility for the defense of any such claim and shall retain legal counsel, who shall defend in conjunction with the legal department of the Company. Such defense shall be maintained until final judgment

> in favor of the Insured shall have been obtained or until all remedies by appeal, writ of error or other legal proceedings deemed reasonable and appropriate by the Company shall have been exhausted at the Company's cost and without limit as to the amount expended . . . "

7. The policy further provided that "D. The Company shall not compromise any claim hereunder without the consent of the Insured."

8. On or about August 10, 1981, an action against plaintiff, styled *Mary Elam, William J. Elam, Jr., Cheryl Vavra, and Robert W. Elam vs. Victor Arana, M.D., Internal Medicine Gastroenterology and Surgery, M.D., Inc. and Methodist Medical Center* ("the *Elam* lawsuit"), Case No. CV381-882CC was filed wherein it was alleged *inter alia* that plaintiff's negligence caused the death of William Elam on December 20, 1980.

9. Plaintiff duly advised defendant of the *Elam* lawsuit. Thereafter defendant retained the St. Joseph, Missouri law firm of Brown, Douglas & Brown to represent plaintiff.

10. On or about August 27, 1981, plaintiff wrote R. A. Brown, Jr. a letter stating in part: "Unless you advise otherwise, I would like to go with this case until the end, as to me it's significantly clear that there are no grounds for the petitions of Mr. Bartimus."

11. In a letter dated September 16, 1981, defendant, through its agent David Jackson, told plaintiff that he would be contacted when consultation and his further action became necessary. Plaintiff was assured that defendant and its attorney's would protect his interest according to the terms of the insurance contract.

12. On or about February 28, 1983, Wendell E. Koerner, Jr., an attorney licensed under the laws of the State of Missouri and a partner in the law firm of Brown, Douglas & Brown, acting on behalf of defendant and as defendant's agent, compromised and settled the *Elam* lawsuit for $97,500.00 without plaintiff's knowledge or consent and contrary to defendant's obligation to defend plaintiff according to paragraph B and not to settle claims without plaintiff's consent under paragraph D of the policy.

13. Defendant authorized and/or ratified Koerner's settlement of the *Elam* lawsuit.

14. On April 7, 1983, plaintiff was advised by defendant that the policy would not be renewed and that another policy insuring plaintiff's professional corporation would be cancelled.

15. The fact that the *Elam* lawsuit was settled has become known in the medical community of St. Joseph, Missouri and surrounding areas.

16. As a direct, natural, proximate and foreseeable result of defendant's unauthorized settlement of the *Elam* lawsuit case and as contemplated by the parties, plaintiff has suffered damages including, but not limited to the following:

(a) Inability to obtain medical malpractice insurance of sufficient breadth and amount to cover plaintiff's medical and surgical practice;

(b) Loss of hospital and surgical privileges;

(c) Loss of patient referrals from and consultations with other physicians;

(d) Loss of patients seeking plaintiff's advice and treatment;

(e) The need to defend himself against specious malpractice claims; and

(f) Severe emotional distress, including anxiety, loss of sleep, nausea, embarassment [sic], and fear of performing surgery.

17. Plaintiff was not advised of the settlement of the *Elam* lawsuit until after the settlement had been executed. Defendant intentionally failed to advise plaintiff of the contemplated settlement of the *Elam* lawsuit because defendant knew plaintiff would object thereto. Neither defendant nor its agent Koerner investigated the facts of the case and this settlement were without regard to the actual underlying facts and circumstances.

18. Defendant's intentional violation of its contractual duties was malicious, wanton and done with reckless disregard to plaintiffs' rights.

19. Plaintiff at present is unable to ascertain the exact amount of his damages, but believes them to be in excess of $4,000,000.

WHEREFORE plaintiff prays for an award of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Punitive damages in the amount of $10,000,000.00;

(d) Costs of this action;

(e) Such other relief as may be appropriate.

COUNT II

TORTIOUS VIOLATION OF THE COVENANT OF GOOD FAITH AND FAITH [sic] DEALINGS

20. Plaintiff realleges and incorporates herein by reference in paragraphs 1-18, *supra*.

21. Defendant, through in-house counsel and its employment of Wendell Koerner of the law firm of Brown, Douglas & Brown, assumed control over the legal proceedings brought against plaintiff and was then obligated to deal with plaintiff with the utmost good faith.

22. Plaintiff, as above described, stated that he did not consent to the settlement of the claims against him, but to the contrary, he wanted the action opposed.

23. Defendant, as above described, settled the *Elam* lawsuit.

24. Defendant had no right whatsoever to settle the *Elam* lawsuit without plaintiff's consent because of the contractual prohibition on such settlements. Defendant knew that it had no such right and knew that plaintiff had objected to settlement and would continue to object to settlement. Defendant knew that it had an obligation to advise plaintiff that its interests conflicted with those of plaintiff, yet defendant failed to so advise plaintiff. Such acts and omissions were done and performed in bad

faith, without just cause or excuse and with full knowledge by defendant that its acts and omissions were wrongful.

WHEREFORE, plaintiff prays for an award of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Punitive damages in the amount of $10,000,000.00;

(d) Costs of this action;

(e) Such other relief as may be appropriate.

COUNT III

NEGLIGENCE

25. Plaintiff realleges and incorporates herein by reference in paragraphs 1-15and 20-22, *supra*.

26. Defendant negligently breached its duty to defend plaintiff in the *Elam* case by:

(a) Failing to investigate the facts and circumstances of the case;

(b) Failing to confer with plaintiff;

(c) Failing to select reasonably competent local counsel in St. Joseph, Missouri;

(d) Failing to adequately oversee and supervise the actions of local counsel;

(e) Failing to advise plaintiff of pending settlement negotiations;

(f) Settling the case without plaintiff's consent.

27. As a direct and proximate result of the negligent acts and omissions of defendant as above described, plaintiff was injured as set forth in paragraph 19.

WHEREFORE, plaintiff prays for an award of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Costs of this action;

(d) Such other relief as may be appropriate.

Respectfully submitted,
VICKER, MOORE & WIEST
By /s/ Loretta W. Moore
Loretta W. Moore
5615 Pershing
St. Louis, Missouri 63112
(314) 344-0786

No. 91-255

In The

Supreme Court of the United States

October Term, 1991

JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON,

Petitioners,

vs.

HOLIDAY INNS OF AMERICA, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The State of Missouri does not deny equal access to Missouri Courts for citizens of Illinois, either by statute or by judicial precedent and no court violated petitioners' rights under the equal protection clause or due process clause of Amendment Fourteen, Section 1 of the United States Constitution.

Petitioners John and Cynthia Bourguignon did not raise their equal protection clause argument in the Court of Appeals or in any lower court. As this constitutional argument is being raised for the first time in their Petition for Writ of Certiorari, this Court should refrain from addressing it.

A review of the United States District Court's opinion reveals that petitioners John and Cynthia Bourguignon have presented a misleading and inaccurate account of the facts regarding their litigation against Holiday Inns of America, Inc. in the federal courts and state courts of Missouri. Contrary to petitioners' arguments, the facts of the *Bourguignon* litigation in the federal courts and Missouri state courts are significantly different from the facts in *Arana v. Koerner,* 735 S.W.2d 729 (Mo.App. 1987).

The Missouri state courts did nothing more than rule on the *Bourguignon* cases and the *Arana* case according to their specific facts and according to the legal principles which applied to each specific case. There is not one shred of evidence of discrimination in favor of Missouri citizens and against Illinois citizens in the Missouri state courts.

LIST OF PARTIES

Respondent Holiday Inns of America, Inc. has no subsidiary corporations. Holiday Inns of America, Inc. is a subsidiary of Holiday Inns, Inc., which is in turn a subsidiary of Holiday Corporation. In addition, Holiday Corporation is a subsidiary of Bass (U.S.A.), Inc.

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No. 91-255

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HOLIDAY INNS OF AMERICA, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The pertinent opinions below are included in the Petitioners' Appendix and in Respondent's Appendix. The opinion of the District Court filed on June 8, 1990, and the opinion of the Court of Appeals filed on March 19, 1991 are not reported officially or unofficially and are appended to Petitioners' Appendix, pages 1-17.

A copy of the Court of Appeals' Order denying rehearing, dated May 14, 1991, is included in Petitioners' Appendix, page 18.

The Missouri Court of Appeals has issued two decisions which directly relate to the Petition, which are reported as *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo.App. 1986) and *John Bourguignon and Cynthia Bourguignon v. Thirteen-Fifty Investment Co.*, 759 S.W.2d 300 (Mo.App. 1988). These decisions are included in Respondent's Appendix, pages 1-27.

JURISDICTION

Respondent Holiday Inns of America, Inc. asserts that the petitioners have failed to allege a constitutional violation invoking the jurisdiction of this Court since the decisions of the Missouri state courts and federal courts do not violate the equal protection clause and due process clause of Amendment Fourteen, Section 1 or any other section of the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

The Bourguignons have submitted an inaccurate, incomplete account of the facts in a misguided attempt to argue that the facts of this litigation are similar to the facts in *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987). Holiday Inns incorporates the statement of the facts set forth in the opinion of the United States District Court (Petitioners' Appendix, pages 3-17) and in the two opinions of the Missouri Court of Appeals relating to the same incident (Respondent's Appendix, pages 1-27). A review of these three court decisions reveals the serious

inaccuracies and omissions set forth in the Bourguignons' Statement of the Case.

Holiday Inns will summarize pertinent facts which are not presented in the Bourguignons' Statement of the Case.

The Bourguignons have filed three actions involving the same event, parties and issues, all arising out of John Bourguignon's accident on June 27, 1977 at a swimming pool in Warrensburg, Missouri. (Petitioners' Appendix, pages 3-17; Respondent's Appendix, pages 1-27). The Missouri Court of Appeals decided the first action, which will be referred to as *Bourguignon I*, in *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo.App. 1986). (Respondent's Appendix, pages 1-15). The Missouri Court of Appeals decided the second action, which will be referred to as *Bourguignon II*, in *John Bourguignon and Cynthia Bourguignon v. Thirteen-Fifty Investment Co.*, 759 S.W.2d 300 (Mo.App. 1988) (Respondent's Appendix, pages 16-27). The United States District Court for the Western District of Missouri issued its Order in the third action, which will be referred to as *Bourguignon III*. (Petitioners' Appendix, pages 3-17).

B. *Bourguignon I*

On June 24, 1982, three days before the expiration of the statute of limitations, R.S.Mo. § 516.120(1), John and Cynthia Bourguignon commenced *Bourguignon I* by filing a Petition in the Circuit Court of Lafayette County, Missouri against Thirteen-Fifty Investment Co. only, alleging

negligence in the operation and maintenance of the swimming pool. (Respondent's Appendix, pages 2, 17). The Bourguignons did not sue Holiday Inns, Inc. in this first action. (Respondent's Appendix, page 17).

The Missouri Court of Appeals stated that the Bourguignons failed to file suit against Holiday Inns in *Bourguignon I* before the expiration of the statute of limitations, in Footnote 3 at 714 S.W.2d 603 (Respondent's Appendix, page 15). Thirteen-Fifty filed a Third Party Petition against Holiday Inns in *Bourguignon I* on July 12, 1983, seeking noncontractual indemnity and/or apportionment of fault under several theories. (Petitioners' Appendix, page 4).

The Circuit Court in *Bourguignon I* granted the Bourguignons leave to file a First Amended Petition against Thirteen-Fifty on July 31, 1984, over the objections of Holiday Inns. (Respondent's Appendix, page 17). Paragraph 6 of the First Amended Petition in *Bourguignon I* adds allegations of negligence against Thirteen-Fifty for the construction activities of Holiday Inns. (Petitioners' Appendix, page 4).

On August 10, 1984, ten days after the Bourguignons filed their First Amended Petition in *Bourguignon I*, the Bourguignons, Thirteen-Fifty and Thirteen-Fifty's insurer, Employers Mutual Casualty Company, executed a settlement agreement. (Petitioners' Appendix, page 5). The Missouri Court of Appeals in *Bourguignon I* disapproved of this agreement, calling it a "contrivance" (Respondent's Appendix, page 10), and stating at 714 S.W.2d 603:

> In sum, the settlement agreement as structured is not consistent with the purpose of § 537.065.

> It motivates an indemnitee to compromise the rights of the indemnitor and to align its interest with those of the claimant in a manner which causes the indemnitee to avoid its responsibilities. And here, the failure by Thirteen-Fifty as an indemnitee to carry out those responsibilities toward its indemnitor, Holiday Inns, Inc., rose to the level requiring Holiday Inns to be discharged under the indemnity contract. (Respondent's Appendix, page 18)

Under this agreement, the Bourguignons were paid $990,000 by Employers Mutual in exchange for their agreement to limit execution against Thirteen-Fifty and Employers Mutual. (Petitioners' Appendix, page 5). In the agreement, Thirteen-Fifty admitted liability for the construction activities of Holiday Inns only. (Respondent's Appendix, pages 11-12, 19). The agreement also provided that if a judgment for contractual indemnity was obtained by Thirteen-Fifty against Holiday Inns, then all sums for indemnity greater than the amount of the judgment of plaintiffs against Thirteen-Fifty less the amount paid under the agreement would be passed through by Thirteen-Fifty to the Bourguignons. (Petitioners' Appendix, page 5; Respondent's Appendix, page 18).

Seven days after entering into this agreement, Thirteen-Fifty amended its Third Party Petition to incorporate the Bourguignons' First Amended Petition, including the allegations of negligence in construction by Holiday Inns. (Respondent's Appendix, page 18).

At the trial of *Bourguignon I*, held in October, 1984, the Bourguignons attempted to prove damages against

Thirteen-Fifty for the construction activities of Holiday Inns, as liability had been conceded by Thirteen-Fifty for the construction activities of Holiday Inns in the agreement. (Respondent's Appendix, page 18-19). As the Missouri Court of Appeals noted in *Bourguignon I*, Thirteen-Fifty's counsel admitted on the record at the trial of the first action, although out of the presence of the jury, that its interests in the case were aligned with the Bourguignons rather than Holiday Inns. (Respondent's Appendix, page 12). The jury was not allowed to hear any evidence concerning the agreement entered into between the Bourguignons and Thirteen-Fifty, over the objections of Holiday Inns. (Respondent's Appendix, pages 7, 19).

The jury returned a verdict against Thirteen-Fifty in favor of John Bourguignon for $12,500,000 and Cynthia Bourguignon for $2,000,000. (Petitioners' Appendix, page 5). Both verdicts were reduced by ten percent for John Bourguignon's comparative fault. (Petitioners' Appendix, page 5). the jury also returned a verdict in favor of Thirteen-Fifty on its contractual indemnification claim against Holiday Inns in the amount of $13,050,000. (Petitioners' Appendix, page 5).

Holiday Inns appealed the judgment entered against it on Thirteen-Fifty's third party claim in *Bourguignon I* and the Missouri Court of Appeals reversed without any remand for a new trial. *Bourguignon I*, 714 S.W.2d 597. (Petitioners' Appendix, page 5).

C. *Bourguignon II*

While *Bourguignon I* was on appeal, the Bourguignons filed a new case against Thirteen-Fifty and Holiday

Inns, in the Circuit Court of Johnson County, Missouri, which will be referred to as *Bourguignon II*. (Petitioners' Appendix, page 7). In their Second Amended Petition the Bourguignons sought to enforce an equitable creditor's bill granting them an interest in Thirteen-Fifty's indemnity claim against Holiday Inns. (Petitioners' Appendix, page 7). As the Missouri Court of Appeals stated in *Bourguignon II*, neither Thirteen-Fifty nor the Bourguignons had a judgment against Holiday Inns. 759 S.W.2d 302 (Respondent's Appendix, page 20).

The Bourguignons further alleged that Holiday Inns had intentionally and fraudulently concealed the defective construction of the swimming pool. (Petitioners' Appendix, page 7). Thirteen-Fifty filed a Cross-Claim and a First Amended Cross-Claim against Holiday Inns for non-contractual indemnification. (Petitioners' Appendix, page 7).

The Circuit Court granted Holiday Inns' Motion to dismiss the Bourguignons' Second Amended Petition and Thirteen-Fifty's First Amended Cross-Claim. (Petitioners' Appendix, page 7).

The Bourguignons and Thirteen-Fifty appealed, and the Missouri Court of Appeals affirmed the Circuit Court's order of dismissal on the basis of res judicata and collateral estoppel, in *Bourguignon II*, 759 S.W.2d 300. (Petitioners' Appendix, pages 9-12).

D. *Bourguignon III*

Following the Missouri Court of Appeals' decision affirming the dismissal of *Bourguignon II*, the Bourguignons filed a Complaint in the United States District

Court for the Western District of Missouri against Holiday Inns relating to the same incident. (Petitioners' Appendix, pages 19-26). This action will be referred to as *Bourguignon III*.

The Bourguignons' identical allegations of fraud against Holiday Inns in *Bourguignon II* and *Bourguignon III* were based on facts known to the Bourguignons during discovery in *Bourguignon I*. (Petitioners' Appendix, page 12).

Holiday Inns responded to the Bourguignons' Complaint in *Bourguignon III* by filing a Motion to Dismiss and for Sanctions pursuant to Rule 11, with Suggestions in Support. (Petitioners' Appendix, page 3).

The United States District Court entered its Order granting Holiday Inns' Motion to Dismiss *Bourguignon III* and denying Holiday Inns' Motion for Sanctions. (Petitioners' Appendix, pages 16, 17).

E. Bourguignons' Appeal to the Court of Appeals For the Eighth Circuit

The Bourguignons appealed from the United States District Court's dismissal of *Bourguignon III* and the Eighth Circuit Court of Appeals affirmed the District Court's decision in a one paragraph per curiam order. The Court stated "[h]aving thoroughly reviewed the record, we agree with the district court's careful analysis and accordingly affirm its decision." (Petitioners' Appendix, pages 1-2).

F. *Arana* Litigation Distinguished

The Bourguignons' citation to *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987) omits the fact that the two separate actions by Dr. Arana were filed on the same date, November 15, 1983. (Petitioners' Appendix, page 28; Respondent's Appendix, page 28). Both actions were filed within the period of the applicable statute of limitations, unlike the Bourguignons' failure to file against Holiday Inns prior to the expiration of the statute of limitations. (Respondent's Appendix, page 15).

G. Misstatements of Fact in Petitioners' Statement of the Case

In addition to the omissions in petitioners' Statement of the Case, certain inaccurate statements require a response from Holiday Inns.

On page 3, petitioners state that the pool was equipped with "false depth markers and was licensed for diving by the State of Missouri as a result of fraudulent plans and depth representations made by pool builder Holiday Inns to the State of Missouri, misrepresentations made unbeknownst to the motel owner." While there was testimony regarding the depth of the pool and inaccuracies in the plans and other documents at the trial of *Bourguignon I*, these matters were never specifically ruled upon by any trier of fact. Further, the Missouri Court reversed the judgment against Holiday Inns without remand in *Bourguignon I*. (Respondent's Appendix, pages 1, 15).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision by the Eighth Circuit Court of Appeals, affirming the opinion of the United States District Court, does not conflict with any provisions of the United States Constitution or any federal statutes and the Bourguignons did not suffer any violation of any constitutional rights.

The Bourguignons did not raise their present equal protection clause arguments in the Eighth Circuit Court of Appeals, in the United States District Court, in the Missouri state courts, or at any stage prior to their Petition for Writ of Certiorari.

Missouri does not discriminate against citizens of other states in its courts, either by statute or in any other fashion. The Bourguignons argue that merely because the courts in their case ruled against them, while the court in the *Arana* case ruled for the plaintiff, and because they are Illinois citizens while the plaintiff in the *Arana* case was a Missouri citizen, that Missouri courts discriminate against Illinois citizens. The Bourguignons ignore the reported factual and legal reasons for the three decisions against them in the Missouri state courts and the United States District Court and ignore the significant distinctions between the facts in their case and the facts in the *Arana* litigation. The Bourguignons ignore the Missouri Court's finding that they failed to sue Holiday Inns prior to the expiration of the statute of limitations and entered into a prejudicial combination with defendant Thirteen-Fifty Investment Co., which was condemned by the Missouri Court. The *Arana* litigation is free of such omission

and prejudicial conduct by plaintiff Dr. Arana. The Bourguignons' constitutional arguments are patently frivolous.

ARGUMENT

The Bourguignons failed to raise their present equal protection clause arguments in the Eighth Circuit Court of Appeals, in the United States District Court, in the Missouri courts, or in any legal proceeding in the lower courts. This Court should refrain from addressing the equal protection issue for that reason. *Equal Opportunity Employment Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986); *Rogers v. Lodge*, 458 U.S. 613, 628, n. 10, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982); *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). No extraordinary circumstances exist in this case which should lead this Court to depart from the normal practice of not addressing issues which were not raised in the Court of Appeals.

The Bourguignons complain that they have been "denied access" to the Missouri courts. As set forth in the opinion of the United States District Court and the two opinions of the Missouri Court of Appeals (Petitioners' Appendix, pages 3-17; Respondent's Appendix, pages 1-27), the Bourguignons had abundant access to the Missouri court system and the federal court system. They lost in all three actions which they brought arising out of the same accident. The last two defeats came when motions for summary judgment were granted in favor of Holiday

Inns and against the Bourguignons on the basis of res judicata and collateral estoppel. Both this Court and the Missouri courts have held that no constitutional rights are violated when a party does not go to trial because he has lost on the granting of a motion for summary judgment. *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 336, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Finn v. Newsam*, 709 S.W.2d 889, 892-893 (Mo.App. 1986).

Missouri courts do not deny equal access to citizens of Illinois or citizens of any other state. The Bourguignons argue merely that because they have lost their case, and because Dr. Arana won his case in *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987), and because Dr. Arana was a Missouri citizen and the Bourguignons were Illinois citizens, that Missouri discriminated against them on the basis of state citizenship. This argument is patently frivolous. The Bourguignons have ignored the reported basis for the holdings of each of the decisions by the Missouri Court of Appeals, the United States District Court and the Eighth Circuit Court of Appeals. In *Bourguignon I*, the Missouri Court of Appeals held that the Bourguignons' prejudicial combination with defendant Thirteen-Fifty violated principles of Missouri law and was nothing more than an attempt by the Bourguignons to rectify their failure to sue Holiday Inns prior to the expiration of the statute of limitations. The Missouri Court of Appeals reversed the judgment against Holiday Inns for that reason. In the Missouri state court action characterized as *Bourguignon II*, and in the identical United States District Court action, the courts dismissed the Bourguignons' case on the basis of res judicata and collateral estoppel.

All of this is a far cry from the situation in Dr. Arana's litigation, in which he sued two different entities on the same day, November 15, 1983, both well within the statute of limitations. (Petitioners' Appendix, page 28, Respondent's Appendix, page 28). There is no hint in the Court's decision in *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987) that Dr. Arana filed the two actions in different courts out of a desire to rectify his failure to meet the statute of limitations. There is no hint in *Arana v. Koerner* that Dr. Arana participated in any prejudicial conduct which would have to be struck down by the Missouri courts, as in the Bourguignons' case. The facts of the *Arana* litigation and the Bourguignons' many lawsuits are completely different and no conclusions can be drawn from the fact that Dr. Arana won and the Bourguignons lost. Certainly no conclusion can be drawn that the Missouri Court decided Dr. Arana's case favorably to him because he is a Missouri citizen, while ruling against the Bourguignons because they were Illinois citizens. There is not one shred of evidence to support this alleged discrimination. The Bourguignons' suggestion that the Missouri Courts discriminated in this fashion is absolutely ridiculous.

The Bourguignons point out no inconsistencies between the Court of Appeals' decision and any federal decisions. The Bourguignons cite *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (1921) for the principle that this Court may go behind the finding of a state court decision to see whether it was without substantial support. A review of the two Missouri Court of Appeals' decisions and the United States District Court decision

(Respondent's Appendix, pages 1-27; Petitioners' Appendix, pages 3-17), reveals that there was ample support for the decisions of the courts in each instance.

This is not a situation in which the Bourguignons have been made the victims of arbitrary, unsupported decisions by a state court. To the contrary, the Missouri Courts of Appeals found that the Bourguignons' combination with defendant Thirteen-Fifty was so prejudicial against Holiday Inns and so contrary to the purposes of Missouri law that the judgment against Holiday Inns would have to be reversed.

The Bourguignons' suggestion that the Missouri Courts of Appeals engaged in deception to hide the real reason for their decisions against the Bourguignons, namely the Bourguignons' Illinois citizenship, is absurd and constitutes a frivolous waste of this Court's time. The two decisions of the Missouri Court of Appeals contained thorough, well-reasoned discussions of the facts and applicable law upon which the decisions were based. The Bourguignons filed a lawsuit identical to the second state court lawsuit in federal court and the United States District Court and the Eighth Circuit Court of Appeals reviewed the entire record again and came to the same conclusion as the Missouri Court of Appeals.

The "discrimination" visited upon the Bourguignons by the Missouri Courts because of their Illinois citizenship exists only in the imagination of the author of the Bourguignons' Petition and has no basis in fact, in any of the decisions of the lower courts, or in any inference

which can be fairly drawn from the decisions of the lower courts. The Bourguignons' arguments are frivolous.

CONCLUSION

For these reasons, the petitioners' Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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HOLIDAY INNS, INC., Third Party Defendant-Appellant,

v.

THIRTEEN-FIFTY INVESTMENT CO., Third Party Plaintiff-Respondent,

and

John Bourguignon and Cynthia Bourguignon, Plaintiffs-Respondents.

No. WD 36698.

Missouri Court of Appeals, Western District.

May 20, 1986.

Motion for Rehearing and/or Transfer to Supreme Court Denied June 26, 1986.

Application to Transfer Denied Sept. 16, 1986.

Paul H. Niewald, Kansas City, for third party defendant-appellant.

Larry L. McMullen, Kansas City, for third party plaintiff-respondent.

Before LOWENSTEIN, P.J., and TURNAGE and BERREY, JJ.

BERREY, Judge.

This is an appeal by Holiday Inns, Inc., from a judgment rendered on the verdict in favor of Thirteen-Fifty on a contractual indemnity claim. This court reverses.

On the night of June 27, 1977, John Bourguignon, a Staff Sergeant in the United States Air Force, after having

gone to a cocktail party, decided to go swimming in the pool at the Holiday Inn Motel in Warrensburg where he was a guest. He dove off the side of the pool two times without incident. On his third dive he hit his head on the bottom of the pool, on the upslope, and was rendered a permanent quadriplegic. On June 24, 1982, three days before the running of the statute of limitations, John Bourguignon and his wife, Cynthia, filed a petition alleging the owner and operator of the motel, Thirteen-Fifty Investment Company, (hereinafter Thirteen-Fifty) was negligent in the maintenance of the swimming pool. Specifically, it was alleged in paragraph 6 that Thirteen-Fifty "was careless and negligent in the following respect, to wit.

> a. defendant failed to maintain the pool in a safe condition;
>
> b. the water in the pool was unreasonably dirty and murky;
>
> c. the pool area and specifically the water in the pool was poorly lighted;
>
> d. the pool area was not marked with warnings of the dangerous conditions present at the pool;"

Defendant Thirteen-Fifty in its answer and first amended answer denied plaintiffs' allegations and asserted John Bourguignon had been negligent and careless in causing his own injuries.

Thereafter, on July 12, 1983, Thirteen-Fifty filed a third-party petition against Holiday Inns, Inc. and

William W. Bond Jr., and Associates, Inc.,[1] seeking indemnification and/or appointment for any liabilities to be adjudged against it. The basis of its claim arises from a franchise agreement between Holiday Inns of America and Thirteen-Fifty.

The Holiday Inn, including the swimming pool, was constructed in 1968-1969 by Holiday Inns, Inc., Constructions Division, pursuant to a construction contract between Thirteen-Fifty and Holiday Inns, Inc., and Thirteen-Fifty was granted a license to operate as the innkeeper. Holiday Inns, Inc., designated the William W. Bond architectural firm to make the proper plans and specifications.

After the parties had made various procedural motions and engaged in discovery, the court granted the Bourguignons leave to amend their petition which was filed on July 31, 1984. Paragraph 6 of the amended petition is as follows:

> That at the aforesaid time and place the Defendant 13-50 was careless and negligent in the following respects, to wit:
>
> a. That said swimming pool, constructed by Holiday Inns, Inc., Third-Party Defendant herein, was of insufficient depth for diving and as a result the pool was not reasonably safe for diving;

---

[1] Early in the procedural history Thirteen-Fifty on March 22, 1984, filed a dismissal without prejudice as to third-party defendant, William W. Bond and Associates.

b. That the water in the pool at said time and place was unreasonably dirty, turbid, milky and murky;

c. That the pool area, and specifically the water in the pool, was inadequately and negligently lighted and illuminated for diving;

d. The pool area was not marked with warnings of the correct depth conditions present at the pool; and

e. That the pool was deceptively shallow and constructed and maintained as such and was never inspected by Defendant for the purposes of ascertaining the true depth and accuracy of the markings of said pool.

On August 10, 1984, ten days after plaintiff's first amended petition, John and Cynthia Bourguignon, Thirteen-Fifty, and the Thirteen-Fifty's insurer, Employers Mutual Casualty Company (hereinafter Employers Mutual) entered into a settlement agreement "MADE PURSUANT TO SECTION 537.065 OF THE REVISED STATUTES OF MISSOURI." This statute provides that a claimant and a tortfeasor may contract to limit recovery by the claimant to designated assets or an amount covered in the tort-feasor's insurance contract for agreed upon consideration.

Thirteen-Fifty and Employers Mutual stated their intentions in the contract as follows:

> Thirteen-Fifty and Employers Mutual, in recognition of their legal liability to John Bourguignon and Cynthia Bourguignon, wish to pay them ~~a sum which~~ constitutes a small portion of their damages as a result of the injuries they have sustained, in consideration for John

> Bourguignon's and Cynthia Bourguignon's agreement, as allowed by Missouri law, to limit the property subject to execution.

The contract reveals Employers Mutual paid $990,000.00 in consideration "[t]hat in the event of judgment in favor of John and Cynthia Bourguignon . . . for damages for bodily injury . . . or for damages for loss of consortium or services sustained . . . neither John Bourguignon nor Cynthia Bourguignon . . . nor any person, firm or corporation claiming by or through them, will levy execution by garnishment or by any other manner against Employers Mutual or Thirteen-Fifty . . . except upon the following:

> (a) The assets of any other insurer, joint tort-feasor, person, corporation or other entity except Thirteen-Fifty or Employers Mutual.
>
> (b) Account Number 7-7-40-8-1-23 at Citizen's Bank of Warrensburg, and Thirteen-Fifty specifically warrants that this account will contain at all times at least the sum of Ten Thousand and No/100 dollars ($10,000.00), and at least this sum will remain in said account from the date of this Agreement until all sums to which John Bourguignon and Cynthia Bourguignon have obtained the right by judgment against Thirteen-Fifty have been paid, or until the amount contained in the above account has been levied upon by John Bourguignon or Cynthia Bourguignon agree to release Thirteen-Fifty from the obligations created in this subparagraph (2)b, whichever shall occur first.
>
> (c) The assets of any other insurer, joint tort-feasor, or any person, corporation, or other entity which has agreed to indemnify or is

> found to have an obligation to indemnify Thirteen-Fifty or Employers Mutual, or is found to have a legal obligation to contribute in full or in part to any judgment obtained by John Bourguignon and Cynthia Bourguignon against Thirteen-Fifty, or the proceeds which any such insurer, tort-feasor, person, corporation or entity directly or indirectly pays or has paid into the hands of Thirteen-Fifty or Employers Mutual in Reimbursement of any sum paid to John Bourguignon or Cynthia Bourguignon, or both of them."

In essence, the Bourguignons were paid $990,000 by Employers Mutual in exchange for their agreement to a contract which limits their ability to execute against Thirteen-Fifty and Employers Mutual. The Bourguignons, after obtaining a judgment for the damages sustained, may execute only upon a designated bank account containing $10,000 and any amount Thirteen-Fifty collects on its contractual indemnity claim.

The contract also provides that "if a judgment for contractual indemnity is also obtained by Thirteen-Fifty against Holiday Inns, Inc., then all such sums for indemnity greater than the amount of the judgment of plaintiffs against Thirteen-Fifty less the amount paid hereunder shall, regardless of which method is used to accomplish payment, be recovered from Holiday Inns, Inc., by Employers Mutual or Thirteen-Fifty."

After entering into this agreement, Thirteen-Fifty then amended its original third party petition to include the Bourguignons' first amended petition and also pled the existence of the agreement entered into by it and the Bourguignons. Additionally, Thirteen-Fifty reaffirmed its

claim for indemnification from Holiday Inns, Inc., for any liabilities adjudged against it. Thirteen-Fifty specifically set forth, in support of its claim, a provision from the construction contract. It provides:

> 4.18.1 The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damages, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Contractor, any Sub-contractor, anyone directly or indirectly employed by any of them or anyone from whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

The suit eventually went to trial; all issues were determined in one action. The Bourguignons proceeded in their cause to prove damages sustained against Thirteen-Fifty as the issue of liability had already been conceded by Thirteen-Fifty and its insurer. Holiday Inns, Inc., was not a party to this action. Thirteen-Fifty abandoned any claims against Holidays Inns, Inc., for apportionment and stood solely on its contractual indemnity claim. The jury was not allowed to hear any evidence concerning the agreement entered into by plaintiffs and Thirteen-Fifty. After all the evidence was heard, the jury returned verdicts in favor of John Bourguignon for

$12,500,000 and Cynthia Bourguignon for $2,000,000 against Thirteen-Fifty. Both verdicts were reduced by 10%, the percentage of fault assessed against John Bourguignon. The jury also returned a verdict in favor of Thirteen-Fifty and against Holiday Inns, Inc., on the contractual indemnity claim in the amount of Thirteen Million Fifty Thousand Dollars ($13,050,000), the amount assessed against Thirteen-Fifty. Holiday Inns, Inc., appeals from this judgment. Thirteen-Fifty does not appeal the verdicts rendered against it for the Bourguignons. Additional facts will be explored as they become relevant only to those issues needed to be addressed for disposition.

In its agreement with the Bourguignons, Thirteen-Fifty admitted liability to plaintiff leaving only the issue of damages for trial. Whatever the outcome on the damage issue at trial, Thirteen-Fifty framed its own protective shield through its agreement with the Bourguignons and its use of the indemnity clause in the construction contract to limit its out of pocket loss. One of the primary issues in this case is whether Holiday Inns, Inc., is required to satisfy Thirteen-Fifty's liability to plaintiff over and above the settlement amount.

Indemnification exists where a party secures or protects another against hurt, or loss or damage. *Eggers v. Centrifugal and Mechanical Industries, Inc.*, 440 S.W.2d 512, 515 (Mo.App.1969). In the context of the indemnity-contribution dichotomy it has been stated "it is . . . appropriate to use the term "indemnity" in referring to a claim for 100% reimbursement. . . . " Generally, under a contract of indemnity, the indemnitor is liable to the indemnitee to the extent of his loss. *Knowles v. Moore*, 622

S.W.2d 803, 806 (Mo.App.1981). The Restatement of Restitution § 80 notes an indemnitor's reimbursement is limited "to the amount of the [indemnitee's] net outlay properly expended." *See Gatto v. Walgreen Drug Co.*, 61 Ill.2d 513, 337 N.E.2d 23, 29 (1975), *cert. denied*, 425 U.S. 936, 96 S.Ct. 1669, 48 L.Ed.2d 178 (1976).

This court also recognizes that the language of the indemnity agreement may call for a distinction to be made concerning the indemnitor's responsibility. Contracts may call for indemnity against liability or indemnity against loss. *Moberly v. Leonard*, 339 Mo. 791, 99 S.W.2d 58, 63 (1936). The court in *Moberly* crystalized that distinction:

> 'A promise to indemnify against the existence of a liability is incurred, and the promisee is entitled to recover damages based on the amount of his liability although he has not satisfied it. On the other hand, a promisor who has undertaken merely to indemnify against damage is liable only when actual payment has been made by the promisee, or damage suffered by him; and then only to the extent of such payment or damage.'

Id., 99 S.W.2d at 63 (quoting from 3 Williston on Contracts, 2501, § 1409). This distinction becomes irrelevant, however, in view of the agreement made between the Bourguignons and Thirteen-Fifty to use the indemnity provision in the construction contract to reduce Thirteen-Fifty's own net outlay.

Thirteen-Fifty's agreement with the Bourguignons made pursuant to § 537.065, RSMo 1978 permits the plaintiffs to execute upon "the proceeds which any

. . . tort-feasor . . . pays . . . into the hands of Thirteen-Fifty . . . in reimbursement of any sum paid John Bourguignon or Cynthia Bourguignon, or both of them." According to the respondent, Thirteen-Fifty, through the structuring of the agreement and the favorable verdicts, the indemnification would properly operate as follows. First, as Thirteen-Fifty has paid one million in partial settlement, it will receive that one million under the indemnity agreement from Holiday Inns, Inc. Secondly, plaintiffs, with the unsatisfied judgment of $13,050,000, will execute upon that $1,000,000 paid to Thirteen-Fifty by Holiday Inns, Inc., pursuant to the agreement. Thirteen-Fifty then retrieves another $1,000,000 and the process is repeated until the plaintiffs' $13,050,000 judgment is satisfied. Unfortunately for the Bourguignons, this contrivance breaks down on the last step of the cycle.

As previously mentioned § 537.065, RSMo 1978, allows a tort-feasor and a claimant to contract to limit the recovery to "specific assets listed in the contract and . . . any insurer which insures the legal liability of the tort-feasor for such damage. . . . " In *Farmer's Mutual Automobile Insurance Co. v. Drane*, 383 S.W.2d 714, 718 (Mo.1964) the court stated the obvious purpose of the statute is "to provide a method whereby one insurer might pay, without litigation, the amount agreed upon between it and the claimant." An insurer as a source of recovery does not invariably encompass "the right to indemnification." Contracts of indemnity are not synonymous with contracts of insurance. *Brotherton v. Patterson*, 406 Pa. 400, 178 A.2d 696, 697 (1962). A claimant under the statute looks only to the *insurer of the tort-feasor. Carter v. Aetna Casualty and Surety Co.*, 473 F.2d 1071, 1074

n. 5 (8th Cir.1973). Had the legislature meant to include a contract of indemnification it would have so stated. The legislature is not so careless in its choice of words.

The question becomes whether "the proceeds paid in reimbursement" is an asset within the meaning of the statute. The word "assets" has no primary or technical meaning; its definition is determined by the context in which it is used. 6A, C.J.S. Assets p. 575. In this case, the proceeds do not come into existence until after it has been determined Thirteen-Fifty has a right to those proceeds under the contract provision 4.18.1 for indemnification. The potential proceeds cannot be viewed as assets. Any other construction would leave indemnitors defenseless against parties who may similarly settle in the primary action. Furthermore, it would provide incentive for the indemnitee to breach its duty of acting "reasonably under all circumstances so as to protect the indemnitor against liability," *American Export Isbrandtsen Lines, Inc. v. United States*, 390 F.Supp. 63, 68 (S.D.N.Y.1975) and of refraining from compromising any of its rights, particularly in settlement negotiations. *Central National Insurance Co. of Omaha v. Devonshire Co.*, 426 F.Supp. 7, 20 (D.Neb.1976) *rev'd in part on other grounds*, 565 F.2d 490 (8th Cir.1977); *see Gatto v. Walgreen Drug Co., supra*. In the instant case, the abrogation of Thirteen-Fifty's duties toward Holiday Inns, Inc., is seen not only in the agreement's structure but also in the manner in which it sought to accomplish its purpose, i.e., a method to pass-through the damage amount from Holiday Inns to the Bourguignons.

Thirteen-Fifty and its insurer specifically admitted liability in the agreement with the Bourguignons by making references to Holiday Inns, Inc., as the one "who

negligently created or caused to be created the dangerous pool"; and who "refuses to acknowledge [its] responsibility." Thirteen-Fifty additionally admitted on the record, although out of the presence of the jury, that its "interests in this case [were] more aligned with the plaintiff[s] than those of the third party defendant." Further, in closing argument before the jury, the attorney for Thirteen-Fifty stated, "under the law of Missouri, because we had a dangerous condition on our premises, namely a swimming pool that was not safe to dive in because of that, because we should have known of it or knew of it, that's true, we are liable under the law to John – Missouri law to John Bourguignon. We can come into court and deny it and try to get out it somehow, or we can come into court and say that's the way it is."

The breach of Thirteen-Fifty's duty toward its indemnitor, Holiday Inns, Inc., is also shored up by the fact Thirteen-Fifty made no attempt to cross-examine plaintiff's expert witness, an economist, who testified to the amount of plaintiff's future damages. Similarly, with regards to evidence concerning alcohol consumption by John Bourguignon which would have the potential effect of reducing the monetory award assessed against Thirteen-Fifty, Thirteen-Fifty's attorney made the following comments in closing argument:

> I want to tell you that the issue of intoxication was placed in this case by me, my client. I filed the pleading in this court house some years ago now, that said and alleged that there was evidence that John Bourguignon was intoxicated. There was evidence of that, and you heard it.

> You heard Mike Cook, the Thunderbird from Nellis Air Force Base, say that John told him, "I had five to seven drinks. I'm feeling no pain." And Sgt. Cook said he looked as if he was intoxicated. All right. That's why we put that issue in this case, because it belongs here. And you should consider that, and you should determine what importance to give to it, and what percentage of fault that deserves.
>
> But, I must say to you it's curious, and for me, somewhat hard to understand, that the ranking enlisted man, Chief Master Sergeant Dan Newton, who more or less seemed to be in charge of the enlisted men at the party, says pretty much the opposite; that John did not, John had a couple of drinks, as John has admitted. Dan Newton says he was not intoxicated. And you know, there were probably 12 or 16 other airmen out there who may have had an occasion to see John. I think you can probably believe that if any of those airmen saw something in John that looked as if he was intoxicated, Holiday Inn probably would have brought them here.

Thus, the facts in this case warrant the application of the "general rule of law that any act[s] on the part of any indemnitee which materially increases the risk, or prejudices the rights, of the indemnitor, will discharge the indemnitor under the contract of indemnity." *Hiern v. St. Paul-Mercury Indemnity Co.*, 262 F.2d 526, 529 (5th Cir.1959); *see, e.g., American Casualty Co. of Reading, Penn. v. Idaho National Bank*, 328 F.2d 138, 142-3 (9th Cir.1964); *General Insurance Co. of America v. Fleeger*, 389 F.2d 159, 161 (5th Cir.1968); *see also Rochelle Bail Agency, Inc. v. Maryland National Insurance Co.*, 484 F.2d 877, 879 (7th

Cir.1973) (Extinguishment of indemnitor's obligation because bondsman failed to maintain supervision over accused and thus breached its duty towards its indemnitor).

Thirteen-Fifty asserts that admitting liability in an agreement made pursuant to § 537.065, RSMo 1978, or admitting liability in court[2] is not objectionable conduct as seen in *United States Fidelity and Guaranty Co. v. Safeco Insurance Co. of America*, 522 S.W.2d 809, 819 (Mo. banc 1975). In *United States Fidelity and Guaranty Co. v. Safeco Insurance Co. of America, supra*, at 818-19 the defendant repeatedly requested its insurer to assume his defense and the insurer refused which caused it to be bound by the results of the litigation. That case is distinguishable from the case at bar in that Thirteen-Fifty did not request Holiday Inns, Inc., to assume its defense nor did the indemnity provision 4.18.1 of the construction contract require it.

In a similar light, Thirteen-Fifty chides Holiday Inns, Inc., for its dissatisfaction with the Bourguignon verdict because it failed to exercise its right to intervene citing *Alsbach v. Bader*, 616 S.W.2d 147 (Mo. App.1981). The record reveals, however, that Holiday Inns, Inc., cross-examined most, if not all, of the witnesses presented by plaintiff.

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[2] In *United States Fidelity and Guaranty Co. v. Safeco Insurance Co. of America, supra*, at 819 the defendant also failed to offer evidence in defense of the claim.

In sum, the settlement agreement as structured is not consistent with the purpose of § 537.065.[3] It motivates an indemnitee to compromise the rights of the indemnitor and to align its interests with those of the claimant in a manner which causes the indemnitee to avoid its responsibilities. And here, the failure by Thirteen-Fifty as an indemnitee to carry out those responsibilities toward its indemnitor Holiday Inns, Inc., rose to the level requiring Holiday Inns to be discharged under the indemnity contract.

All other motions are herein denied.

The judgment in favor of Thirteen-Fifty on its indemnity claim is reversed.

All concur.

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[3] The obvious purpose behind this agreement was to rectify plaintiff's failure to file suit against Holiday Inns before the running of the statute of limitations. It attempts to force Holiday Inns Inc., to make a status change from third-party defendant into "defendant."

John BOURGUIGNON and Cynthia Bourguignon, Appellants,

v.

THIRTEEN-FIFTY INVESTMENT CO. and Holiday Inns, Inc., Respondents.

No. WD 40145.

Missouri Court of Appeals, Western District.

Aug. 30, 1988.

Motion for Rehearing and/or Transfer to Supreme Court Denied Oct. 4, 1988.

Application to Transfer Denied Nov. 15, 1988.

John C. Milholland, Harrisonville, Max W. Foust, Kansas City, for appellants.

Kevin E. Glynn, Larry L. McMullen, Kansas City, for respondents.

Before COVINGTON, P.J., and NUGENT and GAITAN, JJ.

GAITAN, Judge.

This is the second action filed by plaintiffs, John and Cynthia Bourguignon, involving John Bourguignon's accident at a swimming pool in Warrensburg, Missouri on June 27, 1977. This Court decided the first action in *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo.App.1986), and reversed Thirteen-Fifty's judgment in indemnity. This second action arises out of the same events, parties and issues as the first. However,

in this second action the Bourguignons seek to execute against Holiday Inns on an equitable creditor's bill theory and employ a legal theory of noncontractual indemnity which was intentionally abandoned in the first action by Thirteen-Fifty. The trial court dismissed the Bourguignon's Second Amended Petition and Thirteen-Fifty's First Amended Crossclaim in the second action. We affirm.

STATEMENT OF FACTS

A. *First Action*

Both actions arose out of an accident in which John Bourguignon sustained injuries on June 27, 1977, at a swimming pool in Warrensburg, Missouri. On June 24, 1982, three days before the expiration of the statute of limitations, § 516.120(1), RSMo 1952, John and Cynthia Bourguignon filed a petition in the first action only against Thirteen-Fifty. They alleged negligence in the operation and maintenance of the swimming pool.

Thirteen-Fifty initially filed an Answer and First Amended Answer denying the Bourguignons' allegations and asserting contributory negligence against John Bourguignon. Additionally, Thirteen-Fifty filed a Third Party Petition against Holiday Inns on July 12, 1983, seeking noncontractual indemnity and/or apportionment of fault under several theories.

The trial court granted the Bourguignons leave to file their First Amended Petition against Thirteen-Fifty on July 31, 1984, over the objections of Holiday Inns. Paragraph 6 of the First Amended Petition added allegations

of negligence against Thirteen-Fifty for the construction activities of Holiday Inns. They alleged that the agreement was to limit recovery as to Thirteen-Fifty in Accordance with § 537.065, RSMo 1978. On August 10, 1984, ten days after the Bourguignons filed their First Amended Petition, the Bourguignons, Thirteen-Fifty and Thirteen-Fifty's insurer, Employers Mutual Casualty Company, executed a settlement agreement.

Under this agreement, the Bourguignons were paid $990,000 by Employers Mutual in exchange for their agreement to limit execution against Thirteen-Fifty and Employers Mutual. In the agreement, Thirteen-Fifty admitted liability for the construction activities of Holiday Inns only. The agreement also provided that if a judgment for contractual indemnity was obtained by Thirteen-Fifty against Holiday Inns, then all sums for indemnity over the amount of the judgment of the Bourguignons against Thirteen-Fifty would be passed to the Bourguignons, less the amount paid to the Bourguignons under the agreement.

Seven days after entering into this agreement, Thirteen-Fifty amended its Third Party Petition to incorporate the Bourguignons' First Amended Petition, including the allegations of negligence in construction by Holiday Inns. Thirteen-Fifty also amended to specifically designate a contractual provision in support of its indemnity claim against Holiday Inns.

At the trial, Thirteen-Fifty voluntarily abandoned its noncontractual indemnity claims and all other claims against Holiday Inns, except for its contractual indemnity claim. The Bourguignons attempted to prove damages

against Thirteen-Fifty for the construction activities of Holiday Inns, as liability had been conceded by Thirteen-Fifty for the construction activities of Holiday Inns in the agreement. Over the objections of Holiday Inns, the jury was not allowed to hear any evidence concerning the agreement entered into between the Bourguignons and Thirteen-Fifty. Nor was any evidence of contributory negligence by John Bourguignon presented.

This court held that Thirteen-Fifty breached its duties to its indemnitor, Holiday Inns, by actively helping the Bourguignons prove liability against Holiday Inns while Thirteen-Fifty represented to the jury that it was contesting the case. Further, at the trial of the first action, Thirteen-Fifty's counsel made no attempt to cross-examine plaintiffs' expert economist, and in the closing argument, Thirteen-fifty's counsel admitted liability for having a dangerous swimming pool on its premises and argued against John Bourguignon's contributory negligence. Other examples of the combined efforts of the Bourguignons and Thirteen-Fifty at the trial of the first action against Holiday Inns were cited by this Court. These efforts resulted in an adverse ruling on Thirteen-Fifty's third party action.

This Court held that due to the prejudicial conduct of Thirteen-Fifty, combined with the Bourguignons, Holiday Inns would be discharged from any obligations in indemnity. As a consequence, we reversed the jury verdict against Holiday Inns without remanding for trial. The Supreme Court denied the Bourguignons' Petition for a Writ of Prohibition and also denied the applications for transfer filed by the Bourguignons and Thirteen-Fifty. That judgment thereafter became final.

B. *Second Action [WD No. 40145 (Consolidated with WD No. 40170)]*

The Bourguignons filed a second action on August 27, 1985, while the first action was on appeal, in an attempt to execute on Thirteen-Fifty's judgment in contractual indemnity against Holiday Inns on an equitable creditor's bill theory. However, neither Thirteen-Fifty nor the Bourguignons had a judgment against Holiday Inns. Holiday Inns filed a Motion to Dismiss the Bourguignons' Petition in the second action on September 17, 1985. A hearing was held on Holiday Inns' Motion to Dismiss on September 23, 1985. However, the court made no ruling on the merits, because it found that the service of process on Holiday Inns was not properly certified. In its answers in the second action, Thirteen-Fifty admitted all of the allegations of the Bourguignons' First and Second Amended Petitions.

Thirteen-Fifty filed a Crossclaim and first Amended Crossclaim against Holiday Inns in the second action. Thirteen-Fifty alleged noncontractual indemnity against Holiday Inns; a theory which was pled by the Bourguignons in their First and Second Amended Petitions in the second action. Thirteen-Fifty had alleged noncontractual indemnity against Holiday Inns in its Third Party Petition in the first action before abandoning that allegation at the trial of the first action.

Holiday Inns filed motions to dismiss the Bourguignons' First and Second Amended Petitions and Thirteen Fifty's Crossclaim and First Amended Crossclaim in the second action. Holiday Inns alleged, *inter alia*, that the

matters raised by the Bourguignons and Thirteen-Fifty in this second action were barred by the doctrines of res judicata and collateral estoppel, and that no judgment against Holiday Inns existed to execute against.

The trial court heard oral arguments on Holiday Inns' motions to dismiss on October 29, 1987. No other motions were taken up on that date. Again, Thirteen-Fifty aligned itself with the Bourguignons against Holiday Inns.

In its Order of November 20, 1987, the trial court granted Holiday Inns' motions to dismiss the Bourguignons' Second Amended Petition and Thirteen-Fifty's First Amended Crossclaim in the second action. The court held:

> The Court finds and holds that whether Holiday Inns' motions are characterized as motions to dismiss or, as plaintiffs urge, motions for summary judgment, plaintiffs' amended petition and Thirteen-Fifty's amended crossclaim are dismissed on the basis that by the ruling of the Missouri Court of Appeals in *Holiday Inns, [Inc.] vs. Thirteen-Fifty Investment Company and John Bourguignon and Cynthia Bourguignon*, 714 S.W.2d 597 (Mo.App.1986), they are now estopped from asserting further rights to collect plaintiffs' judgment against Holiday Inns and that there is no judgment upon which execution can issue in favor of plaintiffs against Holiday Inns.

Both the Bourguignons and Thirteen-Fifty appeal that judgment.

While at first glance this case seems to be fairly complex, it may be resolved on a relatively simple basis. The Bourguignons' Second Amended Petition in the second action sought an equitable creditor's bill which requires the existence of a judgment. In *General Grocer Co. v. Ahlemeier*, 627 S.W.2d 61 (Mo.App.1981), the court held that "[w]hen a creditor seeks to maintain a creditor's bill, he is required to first reduce his claim to a judgment before he seeks relief in equity." *Id.* at 64. Since this Court reversed Thirteen-Fifty's judgment in contractual indemnity in the first action, there was no judgment against Holiday Inns.

It is clear from the argument of the Bourguignons that they are attempting to step into the shoes of Thirteen-Fifty. This, they believe they are entitled to do because of the judgment which followed their settlement agreement. They perceive that beyond the $990,000 to which Thirteen-Fifty and the Bourguignons agreed, the Bourguignons have a right to any chose in action as an asset of Thirteen-Fifty. The chose in action that they believe they are entitled to is the claim against Holiday Inns that Thirteen-Fifty would be entitled to pursue for noncontractual indemnity.

The doctrines of res judicata and collateral estoppel require dismissal when a party tries to relitigate an action involving the same events, parties, and issues as in a previously decided action. This is true notwithstanding the party's attempt to pin a different label on its legal theories in the second lawsuit. *Siesta Manor, Inc. v. Community Federal Savings & Loan Ass'n.*, 716 S.W.2d 835 (Mo.App.1986); *Dreckshage v. Community Federal Savings & Loan Ass'n.*, 641 S.W.2d 831 (Mo.App.1982).

Both actions by the Bourguignons involve the accident of John Bourguignon in the swimming pool in Warrensburg on June 27, 1977, and the potential responsibility of John Bourguignon, Thirteen-Fifty and Holiday Inns for his injuries and his wife's derivative claims. The Bourguignons and Thirteen-Fifty have merely framed their pleadings in this second action around legal theories which were available to them at the time of the first action. As a matter of fact, as previously stated, Thirteen-Fifty initially alleged noncontractual indemnity and tort claims against Holiday Inns in the first action, but they intentionally and strategically abandoned all claims except contractual indemnity in that first action. All of the facts relied upon by the Bourguignons and Thirteen-Fifty in support of their present tort, fraud, and noncontractual indemnity claims were known during discovery and before the trial of the first action.

Thirteen-Fifty and the Bourguignons now erroneously argue that Thirteen-Fifty misconceived its contractual indemnity remedy in the first action, and, therefore, brought an "imaginary" or "mistaken" remedy by pursuing the contractual indemnity. They take this position because of the finding of this Court in disposing of the first action. They apparently conclude that we held that Thirteen-Fifty never had a remedy of contractual indemnity. However, this Court held in *Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo.App.1986):

> Thus, the facts in this case warrant the application of the "general rule of law that any act[s] on the part of any indemnitee which materially increases the risk, or prejudices the rights, of the

> indemnitor, will discharge the indemnitor under the contract of indemnity."

Id. at 603. This Court went on to state that the failure of Thirteen-Fifty as an indemnitee to carry out those responsibilities toward its indemnitor, Holiday Inns, rose to the level of requiring Holiday Inns to be discharged under the indemnitor contract.

Contrary to the position of both the Bourguignons and Thirteen-Fifty, we construe this to mean that Thirteen-Fifty did, in fact, initially have the remedy of contractual indemnity to pursue against Holiday Inns, but forfeited that right by its conduct. That conduct was not limited to the execution of the settlement agreement, *see Holiday Inns, Inc. v. Thirteen-Fifty Investment Co.*, 714 S.W.2d at 602-03, but also included conduct in direct examination and cross-examination of its witnesses, and Thirteen-Fifty's confession of liability for Holiday Inns. The structure of the settlement was merely a method to pass damages to Holiday Inn; an attempt to create an asset to justify the use of § 537.065, RSMo 1978. As we previously stated in *Holiday Inns v. Thirteen-Fifty, supra*, at 603, "the settlement agreement as structured is not consistent with the purpose of § 537.065."

In defense of its position, the Bourguignons have argued that *Pemberton v. Ladue Realty and Construction Co.*, 359 Mo. 907, 224 S.W.2d 383 (1949), applies. In *Pemberton*, the plaintiff alleged that he had not been paid for services rendered to a partnership, submitted his action for damages on a quantum meruit theory and obtained a verdict and judgment in his favor. The Court of Appeals held

that, as a matter of law, the plaintiff improperly submitted the case on the quantum meruit theory, which was not a viable remedy because he had a proper cause of action for a breach of a formal partnership agreement. The Supreme Court reversed by drawing a distinction between the situation in which a party proceeds on a "mistaken" or "imaginary" remedy out of ignorance about his proper remedy, and the situation in which a party knowingly elects one of two viable remedies. That court held that there can be no election of remedies unless two or more inconsistent remedies exist, as opposed to the pursuit of an imaginary or mistaken remedy. This principle was also stated by the Court in *Hollipeter v. Stuyvesant Insurance Co.*, 523 S.W.2d 595, 598 (Mo.App.1975).

The Supreme Court in *Davis v. Hauschild*, 243 S.W.2d 956, 959-60 (Mo.1951), held that if a party pursues one of two consistent remedies and obtains a satisfaction of his claim, he is barred from pursuing the other remedy. Missouri law is well settled that a party may not pursue another remedy in this situation regardless of whether the judgment has been for or against the electing party. *King v. Guy*, 297 S.W.2d 617, 622 (Mo.App.1957); *Stambaugh v. Wedlan*, 371 S.W.2d 361, 363 (Mo.App.1963).

Thirteen-Fifty is attempting to follow the forbidden course condemned by the courts in *Hollipeter*, *Pemberton*, and *Davis*. Thirteen-Fifty initially alleged noncontractual indemnity and several other remedies in the first action, but voluntarily abandoned all but contractual indemnity as part of its strategic efforts to aid the Bourguignons in the first action pursuant to the agreement. Having pursued contractual indemnity to judgment in the first

action, Thirteen-Fifty cannot bring a second action under another theory. This case does not invoke the imaginary or mistaken remedy exception to the election of remedies doctrine.

The Bourguignons and Thirteen-Fifty attempt to argue that because of the decision of this Court in the first action, Thirteen-Fifty pursued an imaginary or mistaken remedy. That is not the case here. This Court did not state that it was reversing Thirteen-Fifty's verdict against Holiday Inns due to any feeling by the Court that Thirteen-Fifty's claim was imaginary or mistaken. Instead, this Court held that the conduct of Thirteen-Fifty in the first action under its agreement with the Bourguignons and at trial was so prejudicial and contrary to the purpose of the Missouri law that Holiday Inns was thereby discharged from its duty to indemnify under the contract. In none of the cases cited by the Bourguignons or Thirteen-Fifty did the parties have an absolute preexisting right to their allegedly mistaken theory. These parties did have the right; however, that right was forfeited by their prejudicial conduct.

The Bourguignons argue that contractual indemnity and noncontractual indemnity are not inconsistent, thus negating the bar of the election of remedies doctrine. We disagree with this position. We find that the relationship of the parties, due to the prejudicial settlement agreement, led Thirteen-Fifty to voluntarily elect contractual indemnity as its sole remedy and to abandon noncontractual indemnity. We can only guess at what their reasons could have been.

Here, we find that because the claims of noncontractual indemnity and contractual indemnity were used as strategic devices by Thirteen-Fifty in the first action, Thirteen-Fifty's election of one remedy and abandonment of the other should be binding on Thirteen-Fifty. As Thirteen-Fifty has taken one remedy to judgment and lost, they should not be allowed to follow that action with an alternative theory of recovery. Once again, it should be stated that Thirteen-Fifty did have the remedy of contractual indemnity, but through its course of prejudicial conduct, it forfeited that remedy.

The judgment of the trial court is affirmed.

All concur.

IN THE CIRCUIT COURT OF BUCHANAN COUNTY
STATE OF MISSOURI
DIVISION NO. 2

VICTOR A. ARANA, M.D. Plaintiff vs. WENDELL E. KOERNER, JR. ROBERT E. DOUGLAS, ROBERT A. BROWN, JR. and JOHN P. BEIHL Defendants	Case No. CV 383-1222CC JURY TRIAL DEMANDED ON ALL CLAIMS

PETITION FOR ACTUAL AND PUNITIVE DAMAGES

FILED NOV 15 1983

Comes now plaintiff, Victor A. Arana, M.D., through his counsel, Charles L. Wiest, Jr., and for his causes of action against defendants Wendell E. Koerner, Jr., Robert E. Douglas, Robert A. Brown, Jr. and John P. Beihl states as follows:

Count I

BREACH OF CONTRACT

1. Plaintiff, Victor A. Arana, M.D., is a medical doctor and surgeon, duly licensed to practice medicine in the State of Missouri. Plaintiff is and at all times relevant herein was a resident of St. Joseph, Buchanan County, Missouri, and practicing medicine and surgery in and around St. Joseph, Missouri.

2. Defendants Wendell E. Koerner, Jr., Robert E. Douglas, Robert A. Brown, Jr. and John P. Beihl are and at all times relevant herein were attorneys at law, licensed under the laws of Missouri. Upon information and belief, plaintiff states that defendants above named were and are practicing law under the partnership firm name of Brown, Douglas & Brown with their office and principal place of business at Pioneer Building, Suite 202-209, St. Joseph, Missouri.

3. The acts and omissions of defendant, Wendell E. Koerner, Jr. as hereafter described were done and performed on behalf of and within the scope of his authority as a partner of defendants Douglas, Brown & Beihl in the partnership of Brown, Douglas & Brown.

4. The Medical Protective Company of Fort Wayne, Indiana, (hereafter "Medical Protective") is a corporation organized and existing under the laws of the State of Indiana with its principal place of business in Fort Wayne, Indiana and is authorized to do business, including the sale of medical malpractice insurance in the State of Missouri.

5. On June 1, 1980, for valuable consideration, Medical Protective issued to plaintiff as the insured a policy of insurance, policy number 518270. A copy of said policy is attached hereto as "Exhibit 1" and incorporated by reference as if fully set out herein.

6. Policy number 518270 as described above provided coverage for the period June 1, 1980 through June 1, 1981.

7. Pursuant to the terms of policy number 518270, Medical Protective agreed *inter alia* to defend plaintiff against claims for medical malpractice and to pay on plaintiff's behalf all sums of money for which plaintiff became obligated by reason of liability imposed upon him. With respect to defending plaintiff against claims, policy number 518270 stated:

> "B. Upon receipt of notice, the Company shall immediately assume its responsibility for the defense of any such claim and shall retain legal counsel, who shall defend in conjunction with the legal department of the Company. Such defense shall be maintained until final judgment in favor of the Insured shall have been obtained or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted at the Company's cost and without limit as to the amount expended."

8. Policy number 518270 further provided at paragraph D.

> "D. The Company shall not compromise any claim hereunder without the consent of the Insured."

9. On or about August 10, 1981, an action was commenced against plaintiff herein in the Circuit Court for Buchanan County, Missouri, Case Number CV381-882, by Mary Elam, William J. Elam, Jr., Cheryl Vavra and Robert W. Elam, alleging that plaintiff's treatment of William Elam was negligent.

10 Plaintiff duly advised Medical Protective of the initiation of this action and otherwise complied with all

conditions, precedent on his part under policy number 518270.

11. Sometime between August 10, 1981, and August 16, 1981, Medical Protective retained defendants, to defend plaintiff against the action above described. On August 28, 1981, plaintiff was advised by defendant R. A. Brown, Jr. that defendant Koerner would be the attorney responsible for representling [sic] plaintiff's interests.

12. Pursuant to the terms of policy number 518270 and the representations of R. A. Brown, Jr., plaintiff and defendants entered to into an attorney-client relationship whereby defendants undertook to defend plaintiff in a proper, skillfull and diligent manner. In particular, defendants were obligated not to settle the claim against plaintiff without first obtaining his consent.

13. On or about August 27, 1981, plaintiff told defendant, R. A. Brown, Jr. by letter that he (plaintiff) wanted the case to go to the end because there were no grounds to support it.

14. On or about February 18, 1983, defendant Koerner, without first advising plaintiff or obtaining his consent, entered into a settlement agreement with the plaintiffs in Case No. CV381-882 which obligated Medical Protective to pay to said plaintiffs on the instant plaintiff's behalf the sum of $97,500.00.

15. On April 7, 1983, plaintiff was advised by Medical Protective that policy number 518270 would not be renewed and that another policy insuring plaintiff's corporation would be cancelled.

16. The fact that the *Elam* action above described was settled, has become known in the medical community in St. Joseph, Missouri and surrounding areas.

17. As a direct, natural, proximate and foreseeable result of defendants' unauthorized settlement of the *Elam* case and as contemplated by Medical Protective, defendants and plaintiff, plaintiff has suffered damages including but not limited to:

(a) Inability to obtain medical malpractice insurance of sufficient breadth and amount to cover plaintiff's medical and surgical practice;

(b) Loss of hospital and surgical privileges;

(c) Loss of patient referrals from and consultation with other physicians;

(d) Loss of patients seeking plaintiff's advice and treatment;

(e) The need to defend himself against specious malpractice claims;

(f) Severe emotional distress including anxiety, loss of sleep, nausea, embarrassment and fear of performing surgery.

18. Defendants' settlement of the *Elam* case was done at the insistence of and in furtherance of their business relationship with Medical Protective and was directly contrary to the wishes of and best interests of plaintiff. Defendants knew that their duties as attorneys in the *Elam* case were to plaintiff and not Medical Protective and their acts and omissions were in knowing disregard of that duty.

19. Defendants failed to notify plaintiff of the contemplated settlement of the *Elam* case prior to its settlement because they know that plaintiff would object thereto.

20. Defendants' actions in failing to notify plaintiff of the contemplated settlement of the *Elam* case, in settling the case without plaintiff's consent and in failing to advise plaintiff of the settlement after it was perfected were malicious, wanton and done with reckless disregard to plaintiff's rights.

21. Plaintiff at present is unable to ascertain the exact amount of his damages, but believes them to be in excess of $4,000,000.00.

WHEREFORE, plaintiff prays for an award against all defendants jointly and severally of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Punitive damages in the amount of $10,000,000.00;

(d) Costs of this action;

(e) Such other relief as may be appropriate.

COUNT II

NEGLIGENCE

22. Plaintiff realleges and incorporates herein by reference paragraphs 1-21, *supra*.

23. As plaintiff's attorney defendants owed to plaintiff the duty to use such skill, prudence and diligence, as members of the legal profession generally possess and to loyally represent plaintiff.

24. Defendants breached their duty owed to plaintiff by reason of the attorney-client relationship existing between them by:

(a) Settling the *Elam* case without plaintiff's authorization or consent;

(b) Placing the interests of Medical Protective above those of plaintiff;

(c) Failing to adequately investigate and evaluate the facts in the *Elam* case;

(d) Failing to advise plaintiff of the conflicts in their representation of him and their employment by Medical Protective.

WHEREFORE, plaintiff prays for an award against all defendants jointly and severally of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Costs of this action;

(d) Such other relief as may be appropriate.

COUNT III

WILFUL TORT

25. Plaintiff realleges and incorporates by herein reference paragraphs 1-24, *supra*.

26. Defendants knew that the acts and omissions as set forth in paragraph 24(a) through 24(d) were contrary to their duty to plaintiff and were done willfully, wantonly, maliciously and in reckless disregard of their obligations to plaintiff.

WHEREFORE, plaintiff prays for an award against all defendants jointly and severally of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Punitive damages in the amount of $1,000,000.00;

(d) Costs of this action;

(e) Such other relief as may be appropriate.

Respectfully submitted,

VICKER, MOORE & WIEST
By /s/ Charles L. Wiest, Jr.,
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5615 Pershing
St. Louis, Missouri 63112
(314) 344-0786

No. 91-255

In The

Supreme Court of the United States

October Term 1991

JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON,

Petitioners,

v.

HOLIDAY INNS OF AMERICA, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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PETITIONERS ASSERTED THEIR DUE PROCESS AND EQUAL PROTECTION CLAIMS IN THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT BOTH ON DIRECT APPEAL AND AGAIN ON PETITION FOR REHEARING

Respondent is mistaken in its argument claim that petitioners failed to raise below their contention that they were denied access to Missouri courts on an equal basis with Missouri citizens so that the contention is newly raised by the petition for certiorari (Respondent's Brief, 11).

To the contrary, as soon as petitioners were cast below in the federal district court without a trial on the merits because of the state court dismissal without a trial on the merits, petitioners asserted that they are denied Fourteenth Amendment due process of law in their brief on appeal to the Court of Appeals for the Eighth Circuit (Appendix I)

Respondent has overlooked or disregards the history and breadth of the plea of denial of due process as it bears on the denial of access to the courts. That history and breadth plainly is chronicled in *Truax v. Corrigan*, 257 U.S. 312, 331, 42 S.Ct. 124, 127, 66 L. Ed. 254 (1921), cited and relied on by petitioners in their Petition for Certiorari as precedent for looking behind apparent pure decisions of state law to perceive and remedy the denial of fundamental federal constitutional guarantees.

The *Truax* court wrote that the due process clause of the Fourteenth Amendment is descended from the Magna Charta. The Fourteenth Amendment due process clause

imposes the ancient due process of law requirement (which always has bound the federal government) on the states. On the other hand, the equal protection clause did not exist prior to the Fourteenth Amendment and does not control the federal government. In amplification the *Truax* court wrote of the due process clause, id., 257 U.S. 331, 42 S.Ct. 129, 66 L.Ed. 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado v. California*, 110 U.S. 516, 535, 4 S. Ct. 111, 28 L.Ed. 232. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold."

With respect to access to the courts, the equal protections clause constitutes "further assurances"; the due process clause itself restates the fundamental right to have meaningful access to the courts. Petitioners did raise their claim of denial of due process of law, below. (Appendix I and II)

Respondent's argument suggestion (Respondent's Brief, 14) that petitioner's extra-judicial attempts to settle their claims with another tortfeasor is a ground to deny petitioners due process of law access to the courts has no

foundation either in logic or in law. Respondent cites no authority for such a bizarre argument. There is none.

CONCLUSION

Petitioners respectfully request that this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2147WM

JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON

APPELLANTS

V.

HOLIDAY INNS, INC.

APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION
HONORABLE D. BROOK BARTLETT

OPENING BRIEF OF APPELLANTS
JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON

(Filed Sep. 11, 1990)

[Brief Points I and II are omitted.]

III.

WHERE PLAINTIFF APPELLANTS NEVER HAVE HAD A HEARING ON THE MERITS OF THEIR TORT AND FRAUD CLAIMS AGAINST DEFENDANT APPELLEE BEFORE ANY TRIBUNAL AND THE DISMISSAL OF THEIR STATE COURT ACTION AGAINST APPELLEE BY THE STATE COURT DENIED TO THE PLAINTIFFS ANY HEARING ON THE MERITS AND, THUS, DENIED PLAINTIFFS DUE PROCESS OF LAW UNDER BOTH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE MISSOURI CONSTITUTION, CAN THE DISTRICT COURT NOW DENY TO PLAINTIFFS A TRIAL ON THE MERITS SOLELY ON THE PRECLUSIVE EFFECT WHICH THE DISTRICT COURT CHOOSES TO GIVE TO THE STATE COURT JUDGMENT OF DISMISSAL?

Although the district court is required to give full faith and credit to the judicial proceedings of Missouri, Title 28, U.S.C. § 1738, the district court **cannot give any effect** to the judicial proceedings of Missouri which deny to these plaintiffs due process of law under the Fourteenth Amendment to the Constitution of the United States. See, **Kremer v. Chemical Construction Corp.**, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), 456 U.S. 482; 102 S.Ct. 1898:

> "The State must, however, satisfy the requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. * * * In such a case there could be no constitutionally recognizable preclusion at all."

Requirements for the due process of law to **which plaintiffs are entitled** are promulgated by controlling decisions of the Missouri Supreme Court en Banc (the highest court of Missouri) as it obeys the constitutional mandate that plaintiffs' rights to jury trial of their claims against Holiday Inns "shall remain inviolate". That constitutional guarantee of a jury trial of plaintiffs' claims against joint and several tortfeasor Holiday Inns CANNOT be denied to plaintiffs by the intermediate Missouri court's decision of **[Bourguignon II], Bourguignon v. Thirteen-Fifty Investment Co.,** 759 S.W.2d 300 (Mo.App. 1988).

The due process of law which has been embedded in the law of Missouri for the protection of victims of the torts of joint and several tortfeasors has been explicated in **Page v. Freeman,** 19 Mo. 421 (1854) and in **Arana v. Koerner,** 735 S.W.2d 729 (Mo.App. 1987) both of which are fully considered in the argument of Issue I which we adopt here by reference without fully restating it. Suffice it to say here, due process of law under the established law of Missouri requires a jury trial on the merits of plaintiffs' claims against defendant Holiday Inns, a due process right which was denied to plaintiffs by **Bourguignon II** and which is denied here by the district court.

Plaintiffs have had NO hearing on the merits of their claims before ANY tribunal.

The **hearing** before an impartial tribunal which is required as an essential element of due process of law in this case is a constitutional trial on the merits of plaintiffs' claims before a jury. The Constitution of Missouri

requires it and the controlling case law from the highest court in the state requires it.

The state's denial of a jury trial of plaintiffs' claims against Holiday Inns simply because plaintiffs COULD have sued Holiday Inns with Thirteen-Fifty in **Bourguignon I** is a denial of due process of law. The district court's finding that, since the state permitted plaintiffs to **argue about the denial of a jury trial** ON APPEAL, plaintiffs were afforded the due process of law **hearing** which is required by the constitutions is legally and logically untenable. Jury trial does not mean an argument on appeal. The due process right to notice, opportunity to prepare and to fully and fairly be heard does not mean a **hearing on appeal.**

Denial of a constitutionally guaranteed trial is a denial of due process of law.

A denial of due process of law required under state law automatically is a denial of due process of law under the guarantees of the Fourteenth Amendment to the Constitution of the United States as it controls the States.

The district court cannot deny to plaintiffs the due process of law which the Fourteenth Amendment to the Constitution of the United States demands – for any reason – and expressly not because of the preclusive effect the district court gives to the state court's denial of due process of law to plaintiffs in the state courts. **Kremer v. Chemical Construction Corp.**, supra.

Plaintiffs are entitled to a trial on the merits. The district court has erred.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

JOHN BOURGUIGNON AND CYNTHIA BOURGUIGNON, Appellants,	)	Case No. 90-2147-WM
v.	)	
HOLIDAY INNS OF AMERICA, INC., Appellee.	)	

PETITION FOR REHEARING

(Filed Apr. 3, 1991)

COME NOW appellants and petition for a rehearing pursuant to F.R.A.P. 40 and 8th Cir. R. 40(a) on the ground that, by mistake or oversight, this court's summary affirmance of the trial court's dismissal of appellants' action constitutes this court's own denial of due process and equal protections of law to appellants.

Appellants are damaged victims of a joint tort committed by appellee and another. Appellants have received part payment from the other but have not been paid anything by this joint tortfeasor, appellee.

Appellants, step by step, have attempted to obtain a trial of their legal claims against the second joint tortfeasor, appellee, but at each step have been denied their constitutional rights to a trial.

This court's summary affirmance of the district court's dismissal of appellants' damage action without appellants ever having had a trial before any tribunal

constitutes this court's own denial of due process and equal protections of law to appellants at this step of the proceedings in that:

the Missouri Constitution guarantees, inter alia, due process of law, that there shall be no wrong in Missouri without a remedy and that Missouri's courts shall be open to all, and

The Supreme Court of Missouri has declared that joint tortfeasors in Missouri have several liability for their joint torts and that a tort victim shall have a remedy from each such joint tortfeasor which can be prosecuted by individual actions brought against each without an action against one acting as a bar to an action against another such joint tortfeasor, and

the Missouri Court of Appeals has no jurisdiction or power to overrule or to refuse to follow the controlling decisions of the Supreme Court of Missouri, but, nevertheless, contrary to Missouri law and the Constitution of Missouri, affirmed the Missouri trial court's dismissal of appellants' action against joint tortfeasor, appellant, on mere motion to dismiss and without a trial.

Appellants have been denied due process and equal protections of law (under both the federal Fourteenth Amendment and the Constitution of Missouri by denial of a trial of their claim against appellee) in the Missouri trial court, in the Missouri Court of Appeals, in the United States trial court and now, have been denied due process and equal protection of law at this step by this court's judgment affirming the denial of a trial to appellants (a hearing on the merits) before any court.

WHEREFORE, appellants petition for a rehearing.